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No. _____

In The

Supreme Court of the United States

October Term, 1991

FRANK J. CASO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeal For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO GIVE SEPARATE GOOD FAITH DEFENSE THEORY OF THE CASE INSTRUCTIONS ON THE CONSPIRACY (1) TO DEFRAUD AND (2) TO CONVEY GOVERNMENT PROPERTY WITHOUT AUTHORIZATION AND IMPROPERLY INSTRUCTING ON RECKLESS DISREGARD AND OBJECTIVE REASONABLENESS AS SUFFICIENT TO SHOW SPECIFIC INTENT AND WILLFULNESS?

II.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY GIVING INSTRUCTIONS ON THE SUBSTANTIVE OFFENSE OF UNLAWFUL CONVEYANCE AS PART OF THE CONSPIRACY INSTRUCTION UNDER SECTION 371 OF TITLE 18 OF THE UNITED STATES CODE?

III.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO PERMIT THE JURY TO BE INSTRUCTED ON ACTUAL BUT UNOFFICIAL AUTHORITY OR THE DEFENSE THEORY ON THAT ISSUE?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeal for the Fourth Circuit were petitioner Frank J. Caso (the appellant below), co-appellant John R. Kiely, and respondent United States of America (the appellee below).

The parties to the proceedings before the trial court (United States District Court for the Eastern District of Virginia) were the petitioner (then a defendant), co-defendant John R. Kiely, and respondent (then the plaintiff).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Frank J. Caso, respectfully prays that a writ of certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeal for the Fourth Circuit, filed on June 14, 1991, with rehearing denied on July 23, 1991, affirming petitioner's conviction for conspiracy (1) to defraud the United States and (2) to convey government property without authorization, in violation of Section 371 of Title 18 of the United States Code.

OPINION BELOW

The unpublished opinion of the United States Court of Appeal for the Fourth Circuit is reproduced in the Appendix hereto. App. 1-26.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit against petitioner Caso and co-defendant Kiely was entered on June 14, 1991. The judgment affirmed the June 22, 1990, conviction of petitioner Caso for conspiracy (1) to defraud the United States government and (2) to convey government classified documents without authority, in violation of Section 371 of Title 18 of the United States Code.

On July 23, 1991, the United States Court of Appeals for the Fourth Circuit denied a timely petition for rehearing of its judgment affirming the conviction of petitioner Caso. App. 27-28.

Petitioner Caso was sentenced on July 27, 1990. He received a split sentence of two years imprisonment with all but six months suspended on condition of three years probation, a fine of $5,000 and a $50 special penalty assessment. App. 29-33.

The statutory provision conferring jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari is Section 1254 of Title 28 of the United States Code.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

The Constitutional provisions involved in the case are the Due Process Clause of the Fifth Amendment and the Jury Trial and Fair Trial Clauses of the Sixth Amendment and right to present a defense guarantee of the Fifth and Sixth Amendments to the United States Constitution. The United States Code section statutory provisions are Sections 371 and 641 of Title 18 of the United States Code. These constitutional provisions and federal statutes are set forth in the Appendix hereto. App. 74-76.

STATEMENT OF THE CASE

A. Procedural Summary

Petitioner Frank J. Caso ("Caso") was charged by indictment in the United States District Court for the Eastern District of Virginia with conspiracy (1) to defraud the United States and (2) to convey government classified documents without authority, all in violation of Section 371 of Title 18 of the United States Code. The objects of the alleged conspiracy were (1) to defraud the United States and the Department of Defense (hereinafter "DoD") in the maintenance, control, dissemination and protection of certain classified DoD budgeting documents (DoD Planning, Programming and Budgeting System documents – hereinafter "PPBS documents"); (2) to defraud the United States and the DoD by impeding, impairing, obstructing, defrauding and corrupting the DoD's function of maintaining a system for classifying, safeguarding and regulating access to these classified

documents and granting or reviewing security clearances for access to such documents and (3) to convey such documents without authority (a violation of 18 U.S.C. § 641). App. 34-48 (only the relevant portions of the lengthy indictment are reproduced). Jurisdiction of the District Court was predicated upon Section 3231 of Title 18 of the United States Code.

Jury trial in this case commenced on June 18, 1990, and ended on June 22, 1990. Petitioner Caso did not dispute the allegation that he had received and conveyed classified documents. Instead, he presented substantial, indeed abundant, evidence demonstrating that the United States itself had authorized his receipt and conveyance of the classified materials and that at all times he had acted with a good faith belief in the propriety of his actions.

At the conclusion of the trial, the District Court refused to give theory of the defense instructions on good faith and authorization that were crucial to petitioner's defense. Over petitioner's objection the District Court also gave instructions on reckless disregard and objective reasonableness being sufficient to prove specific intent on the substantive offense of unauthorized conveyance under Section 641 of Title 18 of the United States Code. The jury returned a verdict of guilty. On July 27, 1990, Caso was sentenced to a split sentence[1] of two years imprisonment with all but six months suspended on

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[1] This is not a Sentencing Guidelines case since the alleged offense occurred before the effective date of the Guidelines.

condition of three years probation, a fine of $5,000 and a $50 special penalty assessment.

The Court of Appeals held that the District Court's refusal to instruct on actual but unofficial authorization was proper since unofficial authorization was insufficient as a matter of law, relying on its previous decision in *United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1983) (authorization to convey classified documents is a function of the government and its system of accountability, not someone who happens to be in possession of the documents). As discussed, *infra*, this holding is contradictory to the very DoD regulations governing possession and dissemination of classified documents by DoD personnel and defense contractor employees that *Zettl* seeks to vindicate.

The Court of Appeals further held that no separate good faith instruction was required to be given since the District Court instructed on specific intent and willfulness and the good faith instruction given applied to all objects of the alleged conspiracy. As discussed *infra*, the Courts of Appeals are split on whether a trial court must give a separate good faith theory of the defense instruction when requested and the good faith instruction actually given was expressly limited by the District Court to the third object – to convey government documents without authorization. The error was compounded by the District Court's instructing on reckless disregard of authorization and objective reasonables as sufficient to prove willfulness in a manner directly in conflict with this Court's decision in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991) (willfulness requires a lack of *subjective* good faith – test is not objective reasonableness).

The Court of Appeals simply ignored any discussion of the third issue raised by petitioner – that it was error to instruct on the *uncharged* substantive offense of unauthorized conveyance of government property when instructing on the *charged* offense of conspiracy to convey government property without authorization. The Court of Appeals did not even mention the issue in denying the petition for rehearing in spite of the oversight having been specifically brought to its attention. The vast weight of authority holds that substantive instructions on the object of a conspiracy should not be given.

B. Factual Summary

Petitioner Caso was a market research executive with Hughes Aircraft Company ("HAC"), RT 3:218[2], who, throughout his career, had a secret government security clearance. RT 3:229.[3] Beginning in the 1970's and continuing until early 1985, Caso received and conveyed

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[2] RT=Reporter's Transcript On Appeal (by volume and page number and sometimes by witness name).

EX=Trial Exhibit

[3] Appellant John R. Kiely ("Kiely") was a market research executive with Raytheon Corporation through out this time period. Because Kiely is not a party to the instant petition for writ of certiorari, the following summary does not address facts relating to Kiely except where relevant to consideration of the Caso petition.

classified PPBS documents[4], to other market research executives with secret clearances. No bribes or other forms of payment were used to obtain these documents, nor was any other form of *quid pro quo* involved. RT 3:112. Specifically, from the late 1970's until August 1984, Caso exchanged documents with Kiely (Raytheon), Will Gray (Honeywell), Paul Blumhardt (Martin Marietta), and Chuck Curriden and Dan Stewart (General Dynamics). RT 1:202, 226-36; 3:8; 4:29.

The acts of receipt of classified PPBS documents by Caso and conveyance to others essentially was uncontested at trial. The core issue relating to Caso was whether he acted with criminal intent, or, instead, acted with a good faith belief that his actions were lawful and authorized. A closely related key issue was whether the government had actually authorized Caso's receipt and conveyance of the classified documents through an authorized but unofficial system.

The defense demonstrated at trial that the actions of Caso were approved by both his management and the security staff at his employer HAC, that DoD personnel intentionally and purposefully released the classified

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[4] PPBS documents are documents generated by the system by which the DoD produces a plan, program, and budget. PPBS documents mentioned below include the Defense Guidance, the Program Objective Memorandum, the Program Decision Memorandum (PDM), and the five Year Defense Program (FYDP) and the Budget Estimate Submission (BES). App. 44-46.

PPBS documents to the defense contractor community through an unofficial yet sanctioned practice of at least twenty years duration without any notification to the defense contractor community or Caso that the activity was unlawful, and that Caso as well as his counterparts at other defense contracting companies knew of and relied upon these facts in a subjective good faith belief that their activities were lawful. Once it became known by Caso that the government was investigating conduct similar to his, he ceased his activities. This evidence relevant to Caso's good faith belief in the lawfulness of his activities and to the government's unofficial but actual authorization of such activities is summarized *infra*.

1. Caso's Conduct was Approved by HAC

Caso was an employee of HAC for 28 years, having been hired in 1961 and taking an early retirement in December of 1989 while under criminal investigation for the matters ultimately prosecuted herein. RT 3:216. Throughout his career at HAC, Caso worked in market analysis and business planning at the HAC Missile System Group ("MSG") in Canoga Park, California. RT 3:218. Throughout his career at HAC he had a secret level government security clearance. RT 3:229.

In late 1967, Caso first received, without a receipt, a classified PPBS-type document, distributed by the DoD and other government agencies to assist defense contractors in allocating their research and development resources to projects the DoD was interested in funding. RT 3:252-54. Caso went to his MSG management and security supervisors seeking advice on whether and how

he should handle such unreceipted documents. RT 3:234. Caso was advised that it was lawful for him to possess, use, handle, and convey such documents and that HAC security would assist him in the storage and handling of such documents. RT 3:234. Caso was advised that he could convey such documents to other defense contractor employees if they had the requisite security clearance and a need to know the information. RT 3:235.

Caso continued to convey such documents under the HAC system set up for him by HAC management and security until February of 1978. RT 3:234-246. Indeed, HAC top management, Dr. Malcom Currie, the then president of the MSG and a former high DoD official, was aware of and approved of the pre-1978 HAC system for Caso's documents. RT 3:251-54.

In February of 1978 Caso sent, pursuant to the HAC system, some unreceipted documents for destruction through HAC security personnel. RT 3:241, 246. The HAC security personnel did not handle the documents properly and Caso received a major security violation. RT 3:246-50. Thereafter, major discussions occurred between (1) HAC top management at MSG, including Currie and Eugene Babb (Caso's immediate supervisor), (2) HAC corporate and MSG security supervisors (Walter Baaden, HAC corporate security chief; James Calder, HAC MSG security chief; and Robert Gunning, HAC Special Projects security chief) and (3) Caso personally. RT 3:246-55. Caso refused to continue the receipt, use, and conveyance of such documents unless he was assured by top HAC management and security officials that his conduct and the HAC system was lawful and that he would not receive another major security violation for his conduct under a

HAC-approved system. RT 3:255-57. HAC corporate and MSG management and security then set up a system for the receipt, storage, use and conveyance of the Caso documents and assured Caso that the system and his conduct was lawful. RT 3:251-58. Under this system, set up and supervised by MSG security manager Calder and run by Caso's administrative assistant, Sharyn Pinkstaff (a former HAC security employee for Calder used to monitor Caso's compliance with the system), the unreceipted documents were logged into the HAC document control system and handled with some special procedures (i.e., use of postal boxes and certified mail for receipt or conveyance of documents, use of courier passes or no-search directives for entry or exit from the MSG facility, logging in documents through Pinkstaff, provision of high speed copier in secure area, hand-delivery of documents to top MSG management). RT 2:243, 260, 3:59-68. Furthermore, Calder advised Caso that receiving, conveying, or using unreceipted documents was not a violation of law and that the HAC system set up for Caso's documents was legal and complied with the Industrial Security Manual (ISM). RT 3:258-59.

When Calder left his MSG position as chief of security, he was replaced by Gunning (who was involved in Caso's 1978 violation and in setting up the new HAC system for Caso's documents), a career HAC security official with special classified projects experience. RT 3:262. Caso advised Gunning of the HAC system and Gunning authorized its continuance with modifications. RT 3:262.

The HAC system continued in use until March of 1985, when the receipt of new documents was stopped

after the Wall Street Journal published two articles about a government investigation into similar conduct of others. However, Caso, as did others, believed this investigation was directed at the purchase of classified PPBS documents from DoD officials by consultants, *not* receipt from DoD personnel by defense contractor employees with the requisite security clearance and a need to know. RT 3:273-74.

In October of 1985, while Caso was on vacation and without his knowledge, HAC destroyed all of Caso's remaining unreceipted documents, based upon a decision made by Pinkstaff, Babb (Caso's supervisor), and Theodore Wong (the then president of HAC itself). RT 2:262-64; 3:274-76.

2. A Reasonable Reading of the Industrial Security Manual Sanctioned Exchange of PPBS documents Among Cleared Contractors

The Industrial Security Manual ("ISM") regulates defense contractors' handling of classified information. ISM paragraph 20; *see also* DoD Instruction 5220.22. The ISM explicitly provides that classified documents *may* be transmitted to any person with the appropriate clearance who has a need to know the classified information involved.[5] Caso, Kiely, and other industry witnesses

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[5] Specifically, the ISM defines "authorized persons" as "those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information . . . " ISM section I.3.e. "Need to know" is a "determination made by the possessor of classified information

(Continued on following page)

testified that since they transmitted documents only to appropriately-cleared individuals with a need to know, they believed that the ISM authorized their conduct. Franklin RT 1:270-71; Blumhardt RT 2:28-29; 34-35; Stewart RT 2:61-62; 75-77; Stevens RT 2:83-84; Kampf RT 3:52-56; Jackson RT 3:108-110; Pinkstaff RT 2:249, 269-75; Caso RT 3:225-26, 239-41, 261-62, 276-78.

3. The DoD Unofficially Authorized Dissemination of PPBS Information to Certain Defense Contractor Employees

Two DoD officials acknowledged at trial that they had seen given or had given PPBS documents to defense contractors. Thomas Cristie, a former high-ranking official in the office of the Secretary of Defense, testified that from the early 1970's until 1981, he gave Five Year Defense Plans to contractor employees. RT 4:4. Carolyn Chewning, a program management officer with the Defense Advanced Research Projects Agency, testified

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that a prospective recipient, in the interest of national security, has a requirement for access to . . . , knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program approved by a U[ser] A[gency]." ISM section I.3.bg. Moreover, the ISM specifically states that "Responsibility for determining whether individuals' duties require that they possess or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients." ISM section I.3.e.

that DoD had an unofficial policy of providing PPBS documents to defense contractors and that she had seen Program Objectives Memoranda and RDT&E summaries (PPBS documents) given to contractor employees. RT 3:192-208; EX. C-16-J. On the industry side, defense contractor employee John Carroll testified that the Pentagon program officers who were his government counterparts orally communicated classified budget information to him and his colleagues. RT 4:96, 98-102. Finally, the evidence showed that both the trade press and newspapers ran numerous articles containing PPBS information. 4:22-23; EXS. C-16-A to C-16-I, K-58.

4. The Beliefs of Industry Colleagues and the Conduct and Statements of Government Officials Reflected Recognition of an Authorized and Unofficial System of Dissemination

Every defense industry witness called by the government believed that DoD distributed PPBS documents through unofficial channels, and that they did not believe they were violating the law by exchanging them.[6] Franklin RT 1:270-273; Blumhardt RT 2:28-29, 34-35; Gray RT 2:61-62; Stewart RT 2:73, 74-76, 78; Stevens RT 3:85-87, 89; Kampf RT 3:51-55; Caso RT 3:230-31. At worst, these witnesses said they believed they may have committed administrative violations by exchanging documents

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[6] Several of these witnesses also testified that Caso did not believe he was violating the law, and that his character was such that he would not violate the law. *E.g.*, Stevens RT 2:89.

without receipts. Franklin RT 1:272-73; Gray RT 2:60-62. Several witnesses testified that they understood the ISM to authorize their conduct. Kampf RT 3:56, 72-74; Pinkstaff RT 2:249; Caso RT 3:331.

That government officials knew about, and condoned, industry's receipt of PPBS documents bolstered the belief of Caso and other industry employees in the lawfulness of their conduct. DoD Comptroller Questsch told industry representatives that he knew industry had PPBS information. RT 3:51, 71. Defense Investigative Service (DIS) agents examined PPBS documents in companies' possession, and did not question the receipt or possession of any of the PPBS documents. Franklin RT 1:276; Stevens RT 2:85-87; Kampf RT 3:59-60; Jackson RT 2:108-09; Caso RT 3:276-77. When inspectors found a PPBS document Kampf had in his safe but had not yet logged into the RCA classified documents accountability system, they did not question Kampf's receipt or possession of the document, but only his failure timely to log it in. RT 3:32-33, 59-60. The same is true for RCA's Phil Jackson. RT 2:108-109.

Finally, Caso and the others with whom he exchanged documents did not give or receive documents from anyone without a proper security clearance and need to know. Caso did not otherwise compromise the documents. Franklin RT 1:275-76; Gray RT 2:60; Stewart RT 2:77; Caso RT 3:232-33; Kiely RT 4:47.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The opinion of the Court of Appeals in regard to jury instruction issues (1) overlooks important material facts; (2) conflicts with other decisions of the Fourth Circuit Court of Appeals, with the decisions of other Courts of Appeals, with federal regulations, and with this Court's decision in *Bird v. United States*, 180 U.S. 356 (1901) and the recent decision by this Court in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991); and (3) fails to decide all jury instruction issues raised by the petitioner.

The District Court committed reversible error by giving or refusing to give a number of jury instructions, all over defense objection, that were critical to the issues of authorization, good faith, and the conspiracy charge, and deprived petitioner of his rights to a jury trial, to a fair trial, to due process, to present a defense, and to present his theory of the defense.

A. Actual Authorization

The District Court instructed the jury that authorization under the unauthorized conveyance statute (18 U.S.C. § 641), one of the object offenses of the alleged conspiracy, required actual official authorization by a DoD official and refused to give a requested instruction on actual unofficial authorization. Over defense objection, RT 4:110-12, the court instructed the jury:

> The term without authority means the conveyance was made without the permission and consent of a Government official who is actually authorized to give that consent. In other words,

> it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

App. 59-60. The defense requested the following theory of the defense instruction on authorization:

> If the evidence in this case leaves you with a reasonable doubt as to whether the Department of Defense had either officially or unofficially released the PPBS documents relevant to this case to defense contractors, you must find the Defendants not guilty.

App 49. The court refused, over defense objection, to give the instruction. RT 4:110-12, 117-18.

The District Court ruled that an unofficial authorization was legally insufficient. RT 4:110-11. However, the evidence at trial demonstrated that the DoD in fact had an unofficial yet authorized system for distribution of PPBS documents to defense contractors. Franklin, RT 1:270-273, 276, 279; Blumhardt, RT 2:28-29, 34-35; Gray, RT 2:60; Stewart, RT 2:74-76; Kampf, RT 3:51-56, 72-74; Stevens, RT 3:82-84; Chewning, RT 3:192-208, EX. C-16-J; Christie, RT 4:3-5, 8-9; Caso RT 3:230.

Indeed, through Caroline Chewning, a program management officer at the Defense Advanced Research Projects Agency, the defense proved it was standard practice during her 21 years of experience as a government employee that the DoD unofficially made available PPBS budgeting documents to defense contractor employees, and that 95% to 99% of the information was transmitted to defense contractors by the DoD in this manner. RT

3:193-96; EX. C-16-J. She further testified that the DoD released PPBS information in this unofficial manner because the DoD wanted defense contractors to have this information in a timely fashion (RT 3:200-02; EX. C-16-J) and that she had seen DoD representatives distribute Program Objectives Memoranda and RDT&E descriptive summaries, classified PPBS documents, to defense contractors through this "unofficial" channel. RT 3:197-200; EX. C-16-J.

The District Court's ruling precluded the jury from considering this unofficial *de facto* authorization channel as being "authorized," within the meaning of 18 U.S.C. § 641, despite the evidentiary record presented by the appellants on this issue. Whether this unofficial channel was authorization was a question of fact for the jury, not the trial court, to decide.

> A criminal defendant has the right to have the jury decide all questions of fact, and it is error for the district judge to withdraw factual disputes from the jury.

United States v. Walker, 677 F.2d 1014, 1016 (4th Cir. 1982). Furthermore, "a defendant is entitled to an instruction submitting to the jury any theory of the defense for which there is a foundation in the evidence." *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984).

In *Bird v. United States*, 180 U.S. 356 (1901), this Court held that a criminal defendant is entitled to a jury instruction on any theory of the defense finding support in the evidence and the law and the failure to so instruct the jury is reversible error. In *Bird* the trial court failed to instruct on a defendant's reasonable belief in self-defense.

This Court found the failure to instruct on the defense theory to be reversible error.

Bird is the seminal case for the black letter law in the Courts of Appeals that a trial court must give a theory of the defense instruction that has support in the evidence and the law. *E.g., Laughlin v. United States*, 474 F.2d 444, 455 n.14 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 941 (1973); *United States v. Bayer*, 156 F.2d 964, 966 (2nd Cir. 1946) *rev'd on other grounds*, 331 U.S. 532 (1947); *Government of the Virgin Islands v. John*, 447 F.2d 69, 73-74 (3rd Cir. 1971); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971); *United States v. Duncan*, 850 F.2d 1104, 1117-18 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 732 (1990); *see, Weaver v. United States*, 111 F.2d 603, 608 (8th Cir. 1940); *United States v. Ragghianti*, 560 F.2d 1376, 1379 (9th Cir. 1977); *United States v. Lofton*, 776 F.2d 918, 919-20 (10th Cir. 1985).

The failure of the District Court to instruct on unofficial authorization deprived petitioner of his rights to present his theory of defense to the jury and have the jury decide the issue of authorization, especially when there was abundant evidence to support it. This was reversible error.

The Fourth Circuit found no error since such unofficial authorization "was legally insufficient." App. 21. However, this issue was a question of fact for the jury and it was error for the district court to withdraw this issue from the jury. *Bird v. United States, supra.* Furthermore, it was a theory of defense instruction for which there was a foundation in the evidence which the defense was entitled to present to the jury. *Id.*

The District Court's instruction on actual authority, App. 22, was incorrect as a matter of law since it ignored the Industrial Security Manual ("ISM") regulations that bind defense contractor handling and use of classified documents and gives the authority only to the actual *possessor* of a classified document to determine the propriety of further dissemination based upon a need to know and an appropriate security clearance. ISM § 1.3(e). The Fourth Circuit's reliance upon *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1989) is misplaced since the *Zettl* court did not apparently have the contradictory ISM provisions before it when it erroneously held that the possessor of the document is not entitled to determine further dissemination and *Zettl* was decided long after appellants' conduct ended.

B. Good Faith

The District Court refused to give any good faith instruction on the first and second objects of the alleged conspiracy – to defraud the United States under 18 U.S.C. § 371 – and gave inadequate instruction on good faith concerning the third object of the alleged conspiracy – unauthorized conveyance under 18 U.S.C. § 641 – and refused to give requested instructions on the defense theory of good faith.

1. Conspiracy To Defraud The United States

The District Court ruled that good faith was not a defense to a conspiracy to defraud under 18 U.S.C. § 371 (RT 4:106), and refused, over defense objection (RT

4:117-18), to give appellants' requested good faith instructions. App. 49-50. Thus, the court did not give *any* good faith instruction on the first two objects of the alleged conspiracy – conspiracy to defraud the United States. This was reversible error.

In *Miller v. United States*, 277 F. 721 (4th Cir. 1921) the court held that a trial court should instruct on good faith in a charge of conspiracy to defraud and that the issue is one for the jury, not the trial court, to decide. *Miller* was followed by *United States v. Painter*, 314 F.2d 939 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963), *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966), and *United States v. Thompson*, 598 F.2d 879 (4th Cir. 1979) (per curiam).

Miller, Painter, Johnson, and *Thompson* stand for the proposition that the issue of good faith as negating specific intent is a jury question and the trial court must give an instruction on good faith in a conspiracy case, be it a conspiracy to defraud a bankruptcy trustee (*Miller*), a conspiracy to defraud the United States (*Johnson*), or a drug conspiracy (*Thompson*). Indeed, *Johnson* involved the very same conspiracy to defraud statute as was charged herein – 18 U.S.C. § 371. It was error to refuse to instruct on good faith. The Fourth Circuit's opinion completely overlooks all of these cases, not even citing let alone distinguishing them although they were fully briefed by petitioner.

Furthermore, the failure to give petitioner's theory of defense instructions on good faith was error that denied petitioner his right to a jury trial, to present a defense, to a fair trial, and to due process. *Bird v. United States, supra.*

Where there is evidence to support a good faith defense, a separate instruction on good faith must be given to the jury even if the court has also given an instruction on willfulness. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) (false statements).

> Instructing a jury that the government must prove that a defendant intended to commit an offense is quite different from explaining to the jury how the defendant can legitimately counter the government's proof of this essential element of the crime.

Id. at 237; *see, United States v. Johnson, supra*, 337 F.2d at 204.

The Fourth Circuit herein, as well as in *United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991), has joined the District of Columbia, Sixth and Ninth Circuits in not requiring a separate good faith instruction. *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). The Fifth, Eighth, and Tenth Circuits have held a separate good faith instruction is required. *United States v. Harting*, 879 F.2d 765, 767-68 & n.6 (10th Cir. 1989) (instructions on willfulness not sufficient; must be clear submission of the good faith defense as such); *United States v. Harrold*, 796 F.2d 1275, 1283 & n.9 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc) (separate good faith instruction must be given for substantive and conspiracy counts of mail and wire fraud); *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir.

1981). This Court has noted the split in the circuits. *Green v. United States*, 474 U.S. 925 (1985) (White and Brennan, JJ., dissenting from denial of petition for writ of certiorari).

It was reversible error for the court to refuse to instruct on good faith and refuse to give appellants' requested theory of defense good faith instructions on the charge of conspiracy to defraud the United States. *Bird v. United States, supra.*

A conspiracy to defraud under 18 U.S.C. Section 371 reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government. *Tanner v. United States*, 483 U.S. 107, 128 (1987). A conspiracy to commit a substantive offense under 18 U.S.C. Section 371 requires a specific intent to violate the law by an agreement to commit an unlawful act. *Direct Sales Co. v. United States*, 319 U.S. 703, 711-12 (1943); *United States v. Falcone*, 311 U.S. 205, 210 (1940); *Pettibone v. United States*, 148 U.S. 197, 203-08 (1893) (predecessor statute to Section 371 requires specific intent to violate the law). The essence of conspiracy is the agreement to commit an unlawful act. *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

The defense theory herein was that petitioner acted in good faith, with no intent to violate the law. *Bird v. United States, supra*, required the giving of the requested theory of defense instruction.

The Fourth Circuit upheld the refusal to give the good faith instruction, overlooking the above authorities and relying on *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991). However, the *Fowler* situation is clearly distinguishable since in *Fowler* no good faith instruction was

given, whereas here the District Court gave the instruction for only one of the three objects of the conspiracy so that the jury could only believe good faith was a defense to that object and not the other two.

In addition, the Fourth Circuit held that the good faith instruction on the conspiracy to convey without authorization magically carried over to the conspiracy to defraud counts. However, as noted above, the District Court expressly rejected this request and the jury was told good faith was only a defense to the conspiracy to convey without authorization. A jury is presumed to follow the instructions given to them on the law. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (and cases cited therein).

2. Conspiracy To Convey Without Authorization

On the conspiracy to convey without authorization the District Court instructed the jury:

> It is not enough, however, for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was without the lawful authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

App 60.

> It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed

> he had authority, and that this belief was reasonable under all the circumstances.

App. 61.

> I have listed a lot of things that are not a defense. However, while they may not be a defense, they are matters which you may consider in determining whether the defendant reasonably believed that he had authority to convey it.

App. 62.

The District Court refused to give the appellants' requested good faith instructions over objection. RT 4:117-18. For the same reasons that it was error to refuse to give a separate good faith instruction applicable to a conspiracy to defraud, it was error to refuse to give them as to a conspiracy to convey without authorization.

A separate good faith instruction should have been given. *Cf., United States v. Murdock*, 290 U.S. 389, 396 (1933) (a defendant is entitled to instruction on good faith and actual belief). *Cheek* reaffirmed this portion of *Murdock*. *Cheek v. United States, supra*, ___ U.S. ___, 111 S.Ct. at 610.[7]

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[7] In *United States v. Pomponio*, 429 U.S. 10, 11 (1976) (per curiam) this Court held an instruction on bad faith or evil motive – i.e., good faith – was not required since bad faith or evil motive are but parts of willfullness in willfully filing false income tax returns in violation of 26 U.S.C. Section 7206(1). In *Cheek v. United States, supra*, this Court reaffirmed that no instruction on bad faith or evil intent – i.e., good faith – was required. In neither *Pomponio* or *Cheek* was the issue here presented – the need to give a good faith theory of the defense instruction in addition to instructions on specific intent or willfullness in a conspiracy case – resolved by this Court.

Furthermore, it was error to instruct, over objection, RT 4:110-12, that "[t]he Government must also prove that the defendant either knew that the conveyance was without lawful authority, or *that the defendant acted with reckless disregard as to whether the conveyance was authorized.*" App. 60 (emphasis added). *United States v. Eilertson*, 707 F.2d 108 (4th Cir. 1983); *United States v. Walker, supra*, 677 F.2d at 1016-17 n.3 (4th Cir. 1982).

In addition, the Fourth Circuit's opinion overlooks *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991), which requires only subjective reasonableness of the defendant's belief and that the prosecution must prove that the defendant voluntarily and intentionally violated a known legal duty. 111 S.Ct. at 610. *Cheek's* holding has been applied to criminal copyright laws, *United States v. Moran*, 757 F.Supp. 1046 (D.Neb. 1991), and should also be applied to the complex law regarding the handling and use of classified documents. The District Court's reckless disregard and objective reasonableness instructions were erroneous as inconsistent with *Cheek*.

C. Instruction On The Substantive Offense Of Unlawful Conveyance

Over objection, RT 4:105-10, the District Court instructed on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. App 58-60. However, the indictment charged only the offense of conspiracy under Section 371 of Title 18 of the United States Code. The giving of instructions on the substantive offense of unlawful conveyance was improper and confusing to the jury. It is improper for a trial court to instruct on the

elements of substantive offenses which are charged as objects of the conspiracy. *See*, Sand, *Modern Federal Jury Instructions: Criminal* ¶ 19.01 Comment (1990) ("*Sand*"); *United States v. McCoy*, 539 F.2d 1050, 1063-64 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977). It is not necessary for an indictment to set forth the elements of the substantive offense that is the object of the conspiracy. *Wong Tai v. United States*, 273 U.S. 77 (1927). By like token, it is improper to instruct on the substantive elements of the offense that is the object of the conspiracy since it is confusing to the jury and may result in a conviction based upon a substantive offense not charged in the indictment. The standard *Devitt & Blackmar* instructions do not provide for instruction on the elements of the substantive offense that is the object of the conspiracy. Devitt & Blackmar, *Federal Jury Practice & Instructions: Criminal* § 27.01 *et seq.* (3d Ed. 1977); *accord, Sand*, ¶ 19.01 *et seq.*; Federal Judicial Center, *Pattern Criminal Jury Instructions* §§ 62-64 (1988); *Fifth Circuit Pattern Jury Instructions: Criminal Cases* at 61-65 (1983); *Federal Criminal Jury Instructions Of The Seventh Circuit* at 70-77 (1980), at 3-4 (Vol. II, 1983), at 6-7 (Vol. III, 1986); *Manual of Model Criminal Jury Instructions For The Ninth Circuit* at 112-18 (1989); *Eleventh Circuit Pattern Jury Instructions: Criminal Cases* at 70-76 (1985).

It was reversible error to instruct on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. The Fourth Circuit's opinion completely overlooks and fails to discuss this issue briefed by appellants.

CONCLUSION

This petition presents serious issues about (1) the obligation of a trial court to give defense theory of the case instructions consistent with *Bird v. United States, supra,* (2) the need to instruct in good faith as a defense to a conspiracy charge under 18 U.S.C. Section 371, (3) the need to instruct on authorization under the defense theory of the case, (4) the need to avoid confusion by not instructing on the *uncharged* substantive offense that is the object of the *charged* conspiracy, and (5) the need to interpret the application of the subjective reasonableness standard of *Cheek v. United States, supra,* to conspiracy offenses under 18 U.S.C. Section 371.

For all the foregoing reasons this Court should grant the petition for certiorari and reverse the judgment of the Fourth Circuit.

DATED: August 30, 1991

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5830

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FRANK J. CASO,

Defendant - Appellant.

No. 90-5831

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JOHN R. KIELY,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR-90-98-A)

Argued: March 7, 1991 Decided: June 14, 1991

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and BRITT, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished opinion. Judge Phillips wrote the opinion, in which Chief Judge Ervin and Judge Britt joined.

ARGUED: Marcus S. Topel, Daniel F. Cook, TOPEL & GOODMAN, San Francisco, California, for Appellant Caso; Joseph Covington, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Washington, D.C., for Appellant Kiely. Randy I. Bellows, Assistant United States Attorney, Alexandria, Virginia, for Appellee. ON BRIEF: William M. Goodman, Deborah A. Trevino, TOPEL & GOODMAN, San Francisco, California, for Appellant Caso; Brenda Gruss, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Washington, D.C., for Appellant Kiely. Henry E. Hudson, United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PHILLIPS, Circuit Judge:

Frank J. Caso and John R. Kiely were convicted under 18 U.S.C. § 371 of conspiracy to defraud the government by unlawfully impeding, impairing, and interfering with the Department of Defense's ("DOD") effort to maintain control and security of its classified documents, and with

conspiracy to convey without authority property of the United States (classified documents), in violation of 18 U.S.C. § 641. They appeal and assign error to a number of the district court's pre-trial and trial rulings. Finding no error, we affirm their conviction.

I

Caso and Kiely worked as market researchers for two large defense contractors. Caso worked for Hughes Aircraft, and Kiely was employed by Raytheon Corp. They both had "secret" security clearances, because their jobs included receiving and handling classified documents given to them by government officials.

The documents that are the focus of this prosecution were internal budgeting and planning documents that the DOD used to reach decisions on its funding priorities. Some of the documents involved flowed directly from the Secretary of Defense and his Deputy to the secretaries of the military departments, and described the goals to be achieved by DOD. Other documents came from the military departments and were created in response to the Secretary's directive; these documents outlined how each department would allocate its resources. Some documents reflected the debate going on within the Pentagon on budget priorities, while still other documents indicated the final decisions on budgets and program funding. As a consequence, these documents taken together afforded the reader a valuable look into the thought processes of the DOD on critical funding decisions.

Caso and Kiely were indicted for being part of a conspiracy to conduct an "underground market" in this

sensitive information. At trial, the government established that the documents acquired or traded by Caso and Kiely were classified and that Caso and Kiely were not entitled to their possession. In addition, the parties stipulated that each document contained in substantial proportion pages marked "secret."

The government also introduced evidence that Caso and Kiely had ample notice that acquisition and transfer of the documents named in the indictment were internal DOD documents which were not released without authorization to defense contractors. Indeed, the documents themselves carried a number of warnings, such as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "REPRODUCTION OF THIS DOCUMENT IN WHOLE OR IN PART IS PROHIBITED EXCEPT WITH THE PERMISSION OF THE ISSUING OFFICE" printed on the face of the document. In addition, through the ongoing security clearance process Caso and Kiely were frequently made aware of the unlawfulness of failing to follow government procedures on handling and distributing classified documents.

In their defense, Caso and Kiely largely acknowledged receiving these kinds of warnings. But they contend that they thought these warnings were inapplicable to them because they believed in good faith that the documents were lawfully provided to them as part of an "informal DOD policy" to put important budgeting documents in the hands of defense contractors. Against this claim the government offered substantial evidence at trial showing that Caso and Kiely and other members of the conspiracy knew they should not have the documents

and that they took extraordinary steps to avoid detection.*

Defendants do not challenge the sufficiency of the evidence. Instead, they assign error to the district court's pretrial decision not to dismiss or strike a portion of the indictment; to the court's refusal to grant defendant Kiely discovery of a Navy budget document; and to the court's admitting evidence that rebutted Kiely's claim of withdrawal, as well as the jury instructions the court gave, or did not give, on a good faith defense. We take these assignments of error in turn.

II

Caso and Kiely contend that the indictment on its face was fatally flawed and should have been dismissed because it failed to state an offense or that it should have been dismissed for vagueness and lack of fair notice. They also contend alternatively that a portion of the

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* Defendants falsely entered the name and source of these documents in their company's document control system; they removed the "secret" and "confidential" markings that were stamped at the top of every page; they maintained separate mail boxes to receive documents; they mailed "secret" documents to fellow defense contractor researchers at home; they took elaborate steps to hide the documents when their company's offices were inspected by DOD investigators; and they exchanged the documents in surreptitious ways, using unmarked envelopes and exchanging them anywhere but the office. All of this activity was in violation of DOD procedures and federal law on handling and access to classified documents. *See* J.A. at 512-13 (portions of DOD's Industrial Security Manual).

indictment should have been stricken because it charged acts that were either the "result of" the conspiracy or were acts of concealment, but were not in furtherance of the conspiracy. The trial court denied these motions. We find no error in their denial.

A

In assessing whether an indictment should be dismissed for vagueness, the indictment is read in the light most favorable to the government, and the well-established test is whether it was sufficiently detailed in the facts alleged and offense charged necessary to give defendants notice so as to meet double jeopardy concerns. *Hamling v. United States*, 418 U.S. 87 (1974). Read in this light, and guided by "practical, not technical, considerations," *United States v. Morano*, 697 F.2d 923, 927 (11th Cir. 1983), the indictment at issue passes muster.

We start with the offense as defined by statute. Section 371 makes it a crime

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy. . . .

18 U.S.C. § 371. The "defraud" portion of § 371 extends to any conspiracy to obstruct a lawful government function. *Dennis v. United States*, 384 U.S. 855, 861 (1966); *see also McNally v. United States*, 483 U.S. 350, 358 n.8 (1987) ("defraud" in § 371 distinguished from "defraud" in § 1343; "defraud" in § 371 "also means to interfere with or obstruct one of its lawful government functions by

deceit, craft or trickery, or at least by means that are dishonest."). Consequently, an indictment charging conspiracy to defraud under § 371 is not overly vague if it avers an agreement to obstruct a legitimate government function and knowing and willful participation in the conspiracy, and lists overt acts committed in furtherance of the conspiracy. *United States v. Gordon*, 780 F.2d 1165, 1170 (5th Cir. 1986); *see also United States v. Rosengarten*, 857 F.2d 76, 78-79 (2d Cir. 1988) (§ 371 violation may be predicated upon conspiracy to impair, obstruct, or defeat lawful function of any governmental department). An indictment charging conspiracy to commit an offense against the United States, in this case a violation of 18 U.S.C. § 641, must state that the defendant conspired knowingly and willfully to convey or convert government property without authority, and that one of the conspirators took an overt act in furtherance of the conspiracy.

In this case, the 64-page indictment recounts in great detail the particulars of the fraudulent scheme. Maintaining a system of classified documents obviously is a legitimate function of government. *See United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1989); *cf. United States v. Walker*, 796 F.2d 43 (4th Cir. 1986) (espionage prosecution for transferring classified DOD documents related to national defense). The overt acts enumerated in the indictment were sufficient to apprise defendants of facts upon which the conspiracy charge was based. *See United States v. Lane*, 765 F.2d 1376, 1380 (9th Cir. 1985). In addition, such assertions, if believed, could support a finding that the defendants conspired to acquire and convey classified documents. *See Jackson v. Virginia*, 443

U.S. 307, 319 (1979) (one test of indictment is whether it was sufficient to allow a trier of fact to find the essential elements of the crime beyond a reasonable doubt). The indictment also detailed how the alleged conspiracy substantially impaired and impeded the DOD's system of maintaining classified documents. Finally, the indictment included a lengthy list of overt acts indicating that defendants acted with fraud and deceit in carrying out their activities. These allegations, if proven, could support a finding that the defendants acted willfully in violation of § 371. Accordingly, we find the indictment not overly vague.

Defendants also challenge the indictment on the grounds that they did not have "fair notice" that their conduct was proscribed by law. It is of course basic that a person cannot be prosecuted for conduct which he could not reasonably understand to be proscribed, *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964), or conduct which he had no reason to suspect would subject him to prosecution. *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir. 1983). On the other hand, the government is not obligated to point to a "litigated fact pattern directly on point." *United States v. Mallas*, 762 F.2d 361, 364 (4th Cir. 1985) (quoting *Ingredient Technology*, 698 F.2d at 96).

Caso and Kiely had more than fair notice that the conduct charged to them was proscribed. From the first time they obtained their security clearances they were told of the rules on handling classified documents and the penalties for violating such rules. Kiely twice signed notices stating,

> I shall not knowingly and willfully communicate, deliver, or transmit, in any manner, classified information to an unauthorized person or agency. I am informed that such improper disclosure may be punishable under Federal criminal statutes. . . . I have read, or have had read to me, the portions of the . . . Federal criminal statutes relating to the safeguarding of classified information [including 18 U.S.C. § 371].

J.A. at 19. Caso signed similar notices. There is also the unmistakable notice given by the documents themselves, some of which stated, "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS," whereas others warned, "the DOD estimates contained in this issue will not be furnished to anyone outside the executive branch without . . . express written consent. . . . " J.A. at 38. Finally, defendants' multiple acts of petty deception further demonstrate that they knew their acts were prohibited.

B

In addition to the vagueness and fair notice claims, defendants also contend that the indictment should have been dismissed for failure to state a claim. This contention has three parts, one challenging the existence of any allegation that defendants owed a duty to the government, one contending that 18 U.S.C. § 641 cannot serve as a basis for a conspiracy prosecution in this context, and one attacking a number of the overt acts in the indictment which bring appellants' activity within the statute of limitations.

With respect to the first claim, defendants are right that courts have required under § 371 evidence of some

duty running from the defendant to the government. *See, e.g., United States v. Tuohey*, 867 F.2d 534, 538 (9th Cir. 1989). However, the indictment is sufficient in this regard. It states that both defendants had security clearances, which entailed a promise to follow promulgated DOD procedures on handling classified documents. Furthermore, the indictment details how some of the documents had express warnings that the document did not belong in the hands of defense contractors. This suffices to charge the existence of duty.

The argument raised by appellants that this duty did not fall on them because the DOD directives on classified documents applied only to DOD employees proves too much. As the government points out, that would mean a person off the street could distribute without fear of prosecution documents that were plainly marked "secret" and which he knew were classified and which he knew did not belong to him. That cannot be right. As we suggested in *United States v. Mallas*, 762 F.2d at 364, at some point "the authoritative force of common sense" would compel finding of such a duty. Here, however, there is more. Unlike *Mallas*, which involved a prosecution based on an unsubstantiated theory of tax law and in which this court could find no "regulation, judicial decision, or even revenue ruling" to support the government's position, *id.*, here there is ample notice in DOD's Industrial Security Manuals and other sources that classified documents are not baseball cards, they cannot be bought and traded at the whim of the buyer.

Defendants' [sic] next contend that § 641 cannot be used as a basis for an indictment for conspiracy to commit an offense against the United States, since the property

involved is classified material, and § 641's element of "without authority" is unconstitutionally vague. These arguments lack merit.

We find it hard to conjure up a reason why § 641 should not apply to classified documents. The statute makes it a felony to convey "any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof" where the value of such property exceeds $100. 18 U.S.C. § 641. It is hard to imagine "any record" more valuable to the United States than its classified documents. There is no reason to exclude the most sensitive records in the United States' files from this statute. Any argument defendants may have had about the nonapplicability of § 641 to government classified information, based on the premise that the information is not necessarily worth over $100, was rejected by our holding in *United States v. Fowler*, ___ F.2d ___, ___, No. 90-5607, slip op. at 5-6 (4th Cir. Apr. 29, 1991). Building on the reasoning of the Supreme Court in *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (intangible nature of a newspaper's confidential business information did not "make it any less 'property' protected by the mail and wire fraud statutes"), we held in *Fowler* that "§ 641 would apply because information is a species of property and a thing of value." *Fowler*, ___ F.2d at ___, slip op. at 6. In this we joined the Second and Sixth Circuits in holding that conversion and conveyance of governmental information can violate § 641. *See United States v. Jeter*, 775 F.2d 670, 680-82 (6th Cir. 1985); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979).

Finally, defendants contend that "without authority," which is an element of a § 641 violation, is unconstitutionally vague. *See* 18 U.S.C. § 641 (a crime is committed when a person *"without authority,* sells, conveys, or disposes" of government property). We disagree. A number of courts have held that "authority to sell or convey" government property gives defendants adequate notice of what kind of property they can convey and under what circumstances. *See Jeter,* 775 F.2d at 682. We hold that "authority" is a knowable term – it suggests actual permission from someone who has the legal capacity to give permission. Hence, the district court's decision as to these challenges to the indictment is affirmed.

III

Defendants assign error to the district court's decision not to strike a portion of the overt acts enumerated in the indictment. The indictment charged over one hundred and twenty-five overt acts in furtherance of the conspiracy to defraud the government. A portion of the series of enumerated overt acts pertains to the fact that defendants "retained until destruction" a number of classified documents. The indictment also charged that defendants acted to conceal their classified documents from DOD investigators. Before trial defendants moved to strike these portions of the indictment, arguing that retention of the documents was a "result of" and not in furtherance of the conspiracy, and that the acts of concealment came after the conspiracy had ended. The district court rejected these motions, and we affirm.

A

The conspiracy engaged in by Caso and Kiely and proved by the government operated through an underground network whereby one defense contractor obtained the critical budget documents, made a copy, then kept one copy and passed another on to a friend or colleague. After the documents were obtained they served as a resource to the defense contractor in doing business with the government. In this environment, it made little sense to throw out the documents. It is reasonable to conclude that these documents were obtained illegally so that they could be held and used by the defendants. Consequently, we hold that one of the objects of the conspiracy was the illegal retention *and* illegal use of the illegally procured documents.

It is important to realize that retention of the documents made the conspiracy work, and enabled the conspiracy to operate at will. Caso put the documents in the Hughes control system under false titles, with false sources, so that they could be used and retained and not discovered. Similarly at Raytheon, Kiely hid the documents in the computer system and kept them so that they could be passed on later to other defense contractors, usually in exchange for even more classified documents. In this way, classified documents were the coin of the realm, and the use of the coins was what the conspiracy was all about.

The object of the conspiracy was thus to obtain and keep the documents for the future illegal use by the defendant and his company, *and* for future trading value. In this way, the facts at issue here are distinguishable

from a case relied on by appellants, *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989). *Doherty* involved police officers who conspired to steal and sell promotional examinations. The First Circuit faced the question whether the act by the officers of cashing their paychecks from their promoted positions was an act in furtherance of the conspiracy or was a "result of" the conspiracy. In holding that cashing paychecks was merely a result of the conspiracy, the *Doherty* court held

> [W]here receiving the payoff [from the conspiracy] merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, . . . *and* there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues. Rather, in these latter circumstances, one would ordinarily view the receipt of payments merely as the "result" of the conspiracy.

867 F.2d at 61 (emphasis in original).

By contrast, the instant case involves repeated unlawful activity: every time defendants made use of the documents concealed and falsified in their company's document control system, they took additional actions that were proscribed by DOD rules and regulations and punishable by criminal law. *See* J.A. at 512-13 (portions of DOD Industrial Security Manual detailing proper procedures in handling classified information); *see also id.* (Kiely's acknowledgement that willful and knowing disregard of security regulations maybe punishable under federal statutes); *id.* at 516 (a 1978 company report informing Caso that he violated DOD's Industrial Security

Program by receiving, reproducing, and storing sensitive classified information). Therefore, we are not dealing here with "a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions[.]" Instead, we are faced with discrete actions of limited duration, from the time the documents were acquired until the budget documents were no longer useful, and were destroyed. Moreover, the actions here are *un*ordinary and unlawful – very different than cashing a paycheck. That the defendants' activity was out of the ordinary, and violative of DOD rules, is demonstrated by the extensive and extraordinary steps Caso and Kiely took to conceal these documents.

The *Doherty* court also focused on whether evidence exists that the "special dangers" of concerted activity and group association to achieve criminal ends remain present. 867 F.2d at 61. In that case, when the exam was over and the promotions illegally obtained, the danger of concerted activity by the illegally promoted police officers was not present. That contrasts sharply with the conspiracy here that included Caso and Kiely among others. Here the danger of concerted activity remained present as long as the illegally obtained documents remained useful and the infrastructure of the underground market remained in place. At any point, the defrauding of the government could begin anew whenever one of the defendants decided he wanted to trade from his storehouse of illegal documents for one in the hands of a coconspirator. In addition, Caso and Kiely needed each other to cooperate in the falsification and concealment in order to make the documents useful. Consequently, the danger of concerted activity remained present, and that, along with the unordinary and unlawful activity

described above, convinces us that the overt acts were in furtherance of, and not just the result of, the conspiracy. *Cf. United States v. Girard*, 744 F.2d 1170, 1172-73 (5th Cir. 1984) (bid rigging conspiracy went beyond awarding of contract, lasted until final payment made); *United States v. Helmich*, 704 F.2d 547, 549 (11th Cir. 1983) (conspiracy to transfer secret information lasted 17 years after last act of transfer, until final payment was made); *United States v. Mennuti*, 679 F.2d 1032, 1035-36 (2d Cir. 1982) (arson conspiracy lasted after fire until conspirator received his payoff, which was to purchase torched property); *United States v. Walker*, 653 F.2d 1343, 1348-50 (9th Cir. 1981) (fraudulent contract conspiracy lasted until conspirators divided up profits).

B

In addition to arguing that a number of the overt acts listed under "retention until destruction" should have been stricken, defendants also contend that the district court erred when it failed to strike that portion of the indictment that charged three overt acts committed in 1986 in which Caso and Kiely gave false statements to DOD investigators. Appellants contend that these were acts of concealment which took place after the central objectives of the conspiracy, the obtaining and retention of the documents, were achieved.

The test to be applied here comes from *Grunewald v. United States*, 353 U.S. 391 (1957), and its basic teaching is that courts should not infer a subsidiary conspiracy to conceal once the essential purpose of the conspiracy has

been achieved. The reason is that otherwise the conspiracy would be never ending, since virtually all misdeeds require some subsequent acts to keep them secret. However, *Grunewald* also teaches that there is a distinction between concealment acts and acts which are necessary to the successful accomplishment of the crime. 353 U.S. at 405. This last distinction frequently turns on the proximity of the concealment acts to the core of the conspiracy, i.e., there is a difference between concealment acts committed one hour after the object of the conspiracy has been achieved and one year later.

Because we hold that one object of the conspiracy was to retain the documents for their use, then the conspiracy was still alive when the acts of concealment took place. Indeed, the evidence shows that the concealment steps were absolutely necessary because the investigation of defense contractors by the United States Attorney was in full cry, and that but for the concealment the documents that were being used would have been uncovered and the object of the conspiracy, to retain and use the "secret" budget documents, would have been frustrated. Accordingly, we affirm the ruling of the district court to deny the motion to dismiss the indictment.

IV

Defendant Kiely contends that his defense impermissibly suffered because the district court denied his motion to discover a Navy budget document. Kiely considered this document critical because part of his alleged

illegal conduct included taking material out of a classified document and placing it in an unclassified memorandum. The defense wanted the document to show that a portion of the Navy's budget document included unclassified material and that his memorandum only drew from that portion of the Navy budget document.

In reviewing whether the district court erred in denying the discovery motion, the standard is abuse of discretion. *United State v. Nixon*, 418 U.S. 683, 702 (1974); *United States v. Tindle*, 808 F.2d 319, 323 (4th Cir. 1986). In this case, the district court permitted discovery against the government to be far reaching. Entire forests of paper were turned over by the government. Of course, quantity does not make quality. But Kiely's motion for additional discovery was made just five days before trial was to begin. In addition, the overt act that Kiely was trying to disprove, the redacting of information from a classified document, was a small portion of a very large case. Moreover, and we find this telling, the Navy document was not one that a defense contractor could lawfully acquire or convey, whether it was sprinkled with unclassified information or not. Given this, we cannot find that the district court abused its discretion in denying the discovery motion.

V

The final errors assigned by defendants go to the trial court's decision to admit government evidence rebutting Kiely's claim of withdrawal, and to the jury instructions given by the court. With respect to the first, Kiely argues that this evidence should have been excluded and that

had it been then the trial court would have granted his motion for judgment of acquittal. As to the jury charge, both defendants assign error that the jury charge did not include a good faith instruction.

A

Kiely's position at trial was that if there was a conspiracy he withdrew from it five years and one day before being indicted. If a defendant produces evidence of withdrawal, then the burden shifts to the government to prove beyond a reasonable doubt that the defendant did not withdraw. *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989). Kiely produced some evidence: he alleged that at a trade show on March 20, 1985 (5 years and one day before indictment), he read a newspaper account of an investigation of defense contractors and then announced that he was quitting the document game. As a result of this testimony, it fell upon the government to rebut this claim of withdrawal.

In trying to meet this burden the government produced John Domalski, who was a fellow market researcher for a defense contractor, Ford Aerospace. Domalski testified that he asked Kiely around the same time as the purported withdrawal, at the same trade show, where Domalski could get "data that were available to market researchers in our business." According to Domalski, some two weeks later he went up to see Kiely in Bedford, Massachusetts at Raytheon's plant, carrying with him a "confidential" document because he wanted to have a document to trade with Kiely. During that visit, Domalski asserted, Kiely made available to Domalski his

extensive library of "secret" and "confidential" documents, many of which were properly obtained. During his review of these documents Domalski saw the document he had brought for trade bait, and he therefore made no offer of that document. However, he asked for certain classified documents, and Kiely agreed to provide them to Domalski by copying them and mailing them to Domalski's home, in contravention of DOD procedures for handling classified documents. Ford Aerospace, Domalski's employer, considered this an "improper shipment" under the security regulations. The government contends that this episode mirrors earlier exchanges and indicates that the conspiracy continued after the alleged withdrawal.

The problem with the government's position, says the defendant, is that this act was not charged in the indictment. However, the government is not limited to overt acts pleaded in the indictment in proving the existence and duration of a conspiracy, but may show other acts consistent with the conspiracy that occurred during its existence. *See United States v. Gold*, 743 F.2d 800, 813 (11th Cir. 1984) ("[A] variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegations.") Moreover, we find defendant Kiely's contention of less significance when, as here, the testimony was offered in rebuttal of defendant's claim that he withdrew from the conspiracy. Also, the government had other overt acts, namely the "retention until destruction" of the documents, that indicate the conspiracy continued within the statute of limitations. Proof of

the Domalski-Kiely encounter thus was not necessary to the prosecution until the issue of withdrawal was raised by Kiely. Once faced with that burden, the government could rely on additional evidence not included in the indictment. *See id.; United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985) (government not limited in conspiracy cases in its proof to overt acts enumerated in indictment).

B

Finally, defendants challenge the jury instructions given by the court regarding authorization, good faith, and conspiracy. The district court's jury instructions are reviewed "as a whole" to determine whether they fairly summarized applicable law. *United States v. Snyder*, 766 F.2d 167, 170 (4th Cir. 1985).

Caso and Kiely were charged with conspiracy to convey "without authorization" government documents, a violation of 18 U.S.C. § 641. One of the theories advanced by defendants in their opening and closing argument and supported by some of their evidence is that defendants got these documents as part of an "informal DOD policy" to place sensitive but helpful budget documents in the influential hands of defense contractors. Accordingly, appellants requested a jury instruction on "actual unofficial authorization." The trial court refused to give the requested instruction because it found that "unofficial authorization" was legally insufficient. We agree. *See Zettl*, 889 F.2d at 53 (court found that decision to grant authorization "is a function of the government and its system of accountability for classified documents,

not of someone who just happens to be in possession thereof, whether or not he rightfully possesses the document.").

Based on this reasoning, the court instructed the jury:

> The term without authority means the conveyance was made without the permission and consent of a Government official who is actually authorized to give that consent. In other words, it would not be enough that the defendant had the consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

J.A. at 398k. Later in the instructions, however, the trial court added a statement which focused the jury on the knowledge and willful elements of the statute:

> It is not enough, however, for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was without legal authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.
>
> * * *
>
> The word knowingly is added to insure that no one will be convicted in this Court or any other Court because of some mistake or accident or other innocent reason on the part of the defendant.
>
> * * *
>
> [Y]ou may infer the defendant acted knowingly if you conclude that the defendant had a conscious purpose as opposed to negligence or

> mistake to avoid learning an existing fact. That you may infer this however does not relieve the Government of the duty to or the obligation to prove both that the defendant acted knowingly and willfully by proof beyond a reasonable doubt.

J.A. at 398k-98*l*, 398m-98n, 398n.

Though the court did not give defendants their requested instruction on an "unofficial" authorization, a ruling we affirm, the instruction made clear that defendants had to have the requisite scienter as to authorization. As a result, Caso and Kiely could not be convicted for negligently not having actual authorization, nor for reasonably thinking they had actual authorization.

We find the instruction before us indistinguisable [sic] from one which this court recently upheld in *Fowler*, ___ F.2d ___, No. 90-5607 (4th Cir. Apr. 29, 1991). In *Fowler*, we held that a similar instruction, given in a case involving a co-conspirator of Caso's and Kiely's, "specifically told the jury that [defendant] could not be convicted because of negligence[.]" *Id.* at ___, slip op. at 23. Similarly under the present instruction, defendants could only be convicted if they knew or consciously avoided evidence that they lacked actual authorization. We find this instruction adequately states the law and protects a defendant who reasonably believes he acted "with authority." This instruction also is consistent with our holding in *United States v. Biggs*, 761 F.2d 184, 188 (4th Cir. 1985), in which we approved an instruction on reckless disregard when it was stated in terms of "conscious avoidance." *See also United States v. Hester*, 880 F.2d 799, 802 (4th Cir. 1989) (reckless disregard equated with

knowledge where disregard was deliberate and reflects a conscious purpose to avoid learning the truth). Consequently, in accord with *United States v. Fowler*, we uphold the instruction as a fair statement of the law.

Defendants also challenge the jury instruction because it did not, they contend, contain an adequate instruction on good faith. The court refused to give the good faith instruction requested by defendant on the conspiracy to defraud under 18 U.S.C. § 371, since the court held that good faith was not a defense. On the conspiracy to convey without authorization, the court gave the instruction on "without authority" set forth above, and added:

> It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all of the circumstances.

J.A. at 398*l*-98m. From this defendants contend that no good faith instruction was given on defrauding the government, and that the instruction on the unauthorized conveyance was insufficient.

This contention can be tackled in two ways. First, a fair reading of the jury instruction reveals that the court's statement, that the defendants could be convicted only if the jury found that they acted willfully and knew they did not have authorization for the conveyance, applies with full force to all the offenses charged. That is because the heart of the alleged illegal conduct was that defendants obtained documents from others and gave to others classified documents. Thus, the conspiracy to defraud the

government by compromising its classified document system necessarily involves conveying of documents. In this way, the court's instruction that the conveyance must have been done willfully and with knowledge or reckless disregard logically carries over, for the jury, to the other objects of the conspiracy.

More fundamentally, however, we do not see a good faith instruction as warranted. The very concept of good faith is either incompatible with a "willful" or "knowledge" instruction, or is subsumed by those instructions. We believe it axiomatic that a defendant cannot act with "a purpose to disobey the law" and yet "believe[] in good faith that his actions were legal" – the former being the actual jury instruction and the latter being the instruction sought by defendants. Consequently, at one level the so-called good faith defense is logically and legally incompatible with a standard instruction on willful conduct. At another level, the so-called good faith instruction is subsumed in the charge that a defendant cannot be convicted unless the jury finds that he acted with "purpose to disobey or disregard the law." If the jury found the defendant reasonably believed that he was not breaking the law, then the jury would have to find that he necessarily lacked the "purpose to disobey the law." Hence, the instruction sought would have been superfluous, since it is contained within the "willful" instruction.

For these reasons, we hold that the instruction given by the court gave defendants all they are entitled to –

from it, they could argue, as they in fact did, that they in good faith thought they had authorization for the documents. It was for the jury then to decide whom to believe.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 23, 1991

No. 90-5830

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK J. CASO

Defendant - Appellant

No. 90-5831

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHN R. KIELY

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Chief Judge Ervin and Judge Britt, United States District Judge for the Eastern District of North Carolina, sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK

(Rev. 8/87) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

V.

FRANK J. CASO
629 West Lynwood Street
Thousand Oaks, CA 91360

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number:
CR90-98-A

Marcus Topel, Esquire
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[___ guilty ___ nolo contender] as to count(s) _____ , and
XX not guilty as to ~~count(s)~~ the Indictment

THERE WAS A:
[___ finding X verdict] of guilty as to ~~count(s)~~ the Indictment

THERE WAS A:
[___ finding ___ verdict] of not guilty as to count(s) _ .
___ judgment of acquittal as to count(s) _____ .
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy in violation of Title 18 U.S.C. § 371.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two (2) years and shall pay a fine to the United States in the sum of Five Thousand Dollars ($5,000.00); and on condition the defendant serve six (6) months in a halfway house or community treatment center authorized by the Bureau of Prisons, the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation with supervision for a period of two (2) years, to commence upon his release from the halfway house or community treatment center upon the following terms and conditions: 1) his uniform good behavior, 2) that he pay the fine and assessment provided for in this judgment during the period of probation and 3) the standard conditions of probation contained herein.

The defendant is released on present bond pending appeal and, if the Court of Appeals affirms this Court's decision, the defendant shall maintain contact with the U.S. Marshal through counsel to voluntarily surrender at the designated halfway house or community treatment center when space becomes available.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents. If any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States Marshall of this district.

X The Court orders commitment to the custody of the Attorney General and recommends:

a halfway house or community treatment center located in California

July 27, 1990
Date of Imposition of Sentence

Illegible
By Illegible
Clerk

Albert V. Bryan, Jr.
Signature of Judicial Officer

Albert V. Bryan, Jr.
U.S. District Judge
Name and Title of Judicial Officer

July 27, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date
_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	CR90-00098-A
v.	)	
	)	COUNT 1
FRANK J. CASO	)	(18 U.S.C. §371-
JOHN R. KIELY	)	Conspiracy)
	)	

MARCH 1990 TERM – AT ALEXANDRIA, VIRGINIA

INDICTMENT

THE GRAND JURY CHARGES THAT:

GENERAL ALLEGATIONS

At all times material to this indictment:

1. JOHN R. KIELY (hereafter "defendant KIELY") was employed as a senior requirements engineer and manager of market research by Raytheon Company's Missile Systems (Division in Bedford, Massachusetts (hereafter "Raytheon/Bedford"). Defendant KIELY began employment at Raytheon/Bedford on or about March 20, 1967, following his retirement as a major from the United States Air Force. Defendant KIELY's employment at Raytheon/Bedford ended on February 1, 1990.

2. FRANK J. CASO (hereafter "defendant CASO") was employed as manager of market analysis by Hughes Aircraft Company's Missile Systems Group in Canoga Park, California (hereafter "Hughes/Canoga Park"). Defendant CASO began employment at Hughes/Canoga

Park on or about November 20, 1961. Defendant CASO's employment at Hughes/Canoga Park ended on December 1, 1989.

3. Raytheon Company (hereafter "Raytheon") was a Delaware corporation which had contracts with the Department of Defense (hereafter "DOD").

4. The following Raytheon facilities are pertinent to this indictment:

A. Raytheon/Bedford was a division of Raytheon which was responsible for engineering and production of a variety of missiles for the DOD. Defendant KIELY's office was located at Raytheon/Bedford.

B. Raytheon's Washington Operations office (hereafter "Raytheon/Arlington") was located at 400 Army-Navy Drive in Arlington, Virginia, until June, 1984, and at 1215 Jefferson Davis Highway in Arlington, Virginia from that time to the present. Raytheon/Arlington was a division of Raytheon and performed marketing, liaison and licensing functions on behalf of the major divisions of Raytheon.

5. Hughes Aircraft Company (hereafter "Hughes") was a Delaware corporation which had contracts with the Department of Defense.

6. The following Hughes facilities are pertinent to the indictment:

A. Hughes/Canoga Park was a division of Hughes engaged in the engineering and production of a variety of missiles for DOD. Defendant CASO's office was located at Hughes/Canoga Park.

B. Hughes' Washington Operations Office (hereafter "Hughes/Arlington") was located at 1515 Wilson Boulevard in Arlington, Virginia between October, 1970 and October, 1981, and at 1000 Wilson Boulevard between October, 1981 and November, 1985. Hughes/Arlington was a division of Hughes and performed marketing and liaison functions on behalf of the major divisions of Hughes.

7. RCA Corporation (hereafter "RCA") was a Delaware corporation which had contracts with the Department of Defense.

8. The following RCA facilities are pertinent to this indictment:

A. RCA/Government Systems Division's Washington Operations office (hereafter "RCA/Arlington") performed marketing and liaison functions on behalf of the major divisions of RCA. RCA/Arlington was located at 1901 North Moore Street in Arlington, Virginia during the pertinent years of 1979-1985.

B. RCA/Government Systems Division's Cherry Hill facility (hereafter "RCA/Cherry Hill") was a division of RCA and was located in Cherry Hill, New Jersey. This was the facility where Leonard C. Kampf was employed from 1978 to August 1984. This was also the facility where Ronald P. Stevens was employed during the years 1977 through 1985.

C. RCA/Missile and Surface Radar Division (hereafter "RCA/Moorestown") was a division of RCA and was located in Moorestown, New Jersey. This was the facility where Leonard Kampf and Ronald Stevens

entered their documents into RCA's classified document accountability system.

9. Other individuals pertinent to this indictment include the following:

A. Leonard C. Kampf (hereafter "Kampf.") was manager of Marketing Information and Communication at RCA/Government Systems Division from 1969 to August 1984.

B. Ronald P. Stevens (hereafter "Stevens") was manager of Marketing Services at RCA/Government Systems Division during the pertinent years of 1984-1986.

10. The DOD was a Department of the Executive Branch of the Government of the United States and, among its other responsibilities, was charged with protecting and defending the United States of America. In this connection, the DOD directed the design, development and production of weapons systems; recruited trained and maintained personnel; and provided necessary logistical and other support. The documents referred to in this indictment were either DOD documents or documents issued by one of the DOD's service branches, such as the United States Air Force.

CLASSIFICATION OF NATIONAL SECURITY INFORMATION

11. Pursuant to provisions of applicable federal regulation and Executive Orders, the DOD was authorized to designate certain types of information as classified and to maintain a system for the safeguarding and protection of classified information.

12. Classified information was national security information that was owned by, produced by, produced for, or maintained under the control of the United States Government and that was determined to require protection against unauthorized disclosure.

13. National security information was classified at different levels of secrecy. Information classified "SECRET" was defined as information whose unauthorized disclosure reasonably could be expected to cause serious damage to the national security.

THE INDUSTRIAL SECURITY SYSTEM

14. In connection with the design, development and production of weapons systems, the DOD contracted with certain corporations (hereafter "contractors") for the delivery of goods and services.

15. In order that DOD contractors could perform their responsibilities under DOD contracts, programs and projects, the DOD made available to contractors, when necessary to their contractual performance, and on a limited and controlled basis, classified information.

16. Under the DOD Industrial Security Program, a contractor was not permitted to have in its possession any classified information unless it first satisfied each of the following requirements:

a. The contractor executed either a DOD Security Agreement, or an appendage to the DOD Security Agreement, for the facility designated to receive classified information.

b. The contractor possessed a facility security clearance issued by the DOD.

c. Each contractor employee to whom classified information was to be disclosed possessed an individual security clearance issued by, or recognized by, the DOD. Defendant KIELY obtained a SECRET security clearance as a Raytheon employee on or about June 16, 1967. Defendant KIELY retained his security clearance during all times material to this indictment. Defendant CASO obtained a SECRET clearance on January 19, 1962 and a Top Secret Clearance on April 25, 1968. Defendant CASO retained his security clearance during all times pertinent to this indictment.

17. A contractor which was qualified as described in paragraph 16 above to be the recipient of classified information could not be the recipient of *particular* classified information unless such information, the contractor and its employees met the following criteria:

a. The contractor must have been authorized by appropriate DOD personnel to receive the particular classified information. A DOD employee could approve the release of particular classified information only if he had the authority to do so.

b. Once the DOD determined that a contractor had the authority to acquire and possess particular classified information, the contractor designated individual contractor employees to whom classified information was to be disclosed. Not only was the employee required to possess the appropriate security clearance, but it must also have been determined by the contractor that, in

order to perform tasks or services essential to the performance of a classified DOD contract or program, the employee required access to the particular classified information at issue.

18. Possession of a security clearance at the level of SECRET or above was a necessary prerequisite for access to documents classified at the SECRET level. Possession of such a clearance, however, did not constitute a license to give, receive, or exchange SECRET documents among other individuals in possession of security clearances. Rather, the transfer of SECRET documents between and among possessors of security clearances, such as cleared employees of defense contractors, could take place only in compliance with industrial security regulations. These regulations set forth requirements such as verification of personnel security clearances, verification of facility security clearances, classified visit authorization letters, transmittal letters, receipts and logging requirements associated with the release and acquisition of SECRET documents, authorization requirements for the release of particular classified information, and approved mechanisms for the transmittal, shipment and storage of SECRET documents. These requirements were designed to insure that SECRET documents were provided only to those authorized by the government to receive them and that the documents were properly safeguarded at all times.

19. The primary document governing and controlling Raytheon, Hughes and RCA's possession and use of classified information was the DOD's Industrial Security

Manual For Safeguarding Classified Information (hereafter "ISM"). In addition, each corporation had a standard practices security manual.

20. The ISM was the DOD document that instructed and directed defense contractors in the handling and safeguarding of classified information and in the security obligations and responsibilities of their employees. The ISM was applicable to Raytheon, Hughes and RCA by virtue of each corporation's execution of its DOD Security Agreement.

21. The standard practices security manual issued by each corporation was required both by the ISM and by each corporation's execution of its DOD Security Agreement. These manuals implemented the requirements of the ISM.

22. The ISM and each corporation's security manual established rules for a defense contractor's acquisition, retention, dissemination and destruction of classified information. These rules were designed to protect and safeguard the secrets of the United States and imposed mandatory obligations and requirements on a defense contractor and its employees.

23. Prior to being given access to classified information, each company employee who was engaged in work requiring access to classified information was required to be briefed concerning both his obligations to safeguard classified information and the fact that the unauthorized disclosure of classified information could subject him to federal criminal prosecution.

24. Defendant KIELY, at the time of his initial employment by Raytheon, acknowledged and certified his awareness of his security obligations.

a. On March 20, 1967, defendant KIELY signed Part I of a Government form entitled "Security Briefing and Termination Statement." Part I is the "Initial Security Briefing Statement." It was signed by defendant KIELY and witnessed by a Raytheon employee. It reads as follows:

> I hereby certify that I have received a security briefing. I shall not knowingly and willfully communicate, deliver, or transmit, in any manner, classified information to an unauthorized person or agency. I am informed that such improper disclosure may be punishable under Federal criminal statutes. I have been instructed in the importance of classified information, and in the procedure governing its safeguarding. I am informed that willful violation or disregard of security regulations may cause the loss of my security clearance. I have read, or have had read to me, the portions of the Espionage Laws and other Federal criminal statutes relating to the safeguarding of classified information reproduced in Appendix VI, "Department of Defense Industrial Security Manual". I will report to the Federal Bureau of Investigation and to my employer, without delay, any incident which I believe to constitute an attempt to solicit classified information by any unauthorized person.

Among the criminal statutes contained in Appendix VI of the ISM, which defendant KIELY certifies was read by him or to him, was Title 18 United States Code § 371 (conspiracy to defraud the United States).

b. On April 5, 1976, in connection with defendant KIELY's clearance for access to classified intelligence information, defendant KIELY signed another copy of the "Initial Security Briefing Statement".

c. In addition, on October 22, 1982, September 21, 1983, and October 24, 1985, defendant KIELY signed a Raytheon "Security Briefing" statement which further reminded him of his responsibilities for obeying security regulations.

25. Hughes also had a policy requiring that employees granted SECRET clearances be appropriately briefed. In the 1962 memo advising Hughes supervisory personnel that defendant CASO had been granted a SECRET clearance, the memorandum instructed that each cleared employee

> shall receive appropriate instructions from . . . [his] supervisor relative to his . . . continuing individual responsibilities for safeguarding classified information and shall be advised that the unauthorized disclosure of such information violates Department of Defense regulations and contractual obligations and is punishable under the provisions of Federal Statutes.

26. As of 1980, the organization charged by DOD with responsibility for inspecting the industrial security system and classified document control system of DOD contractors and enforcing the industrial security regulations was the Defense Investigative Service (hereafter "DIS"). Prior to 1980, the Defense Logistics Agency held these responsibilities.

THE PLANNING, PROGRAMMING AND BUDGETING SYSTEM DOCUMENTS

27. The Planning, Programming and Budgeting System (hereafter "PPBS") was the system by which the DOD produced a plan, a program and a budget for the DOD. The ultimate objective of the PPBS was to provide the Armed Forces of the United States the best mix of forces, equipment and support which could be obtained within financial constraints.

28. The PPBS required the generation of a series of documents which were issued on a periodic basis during the 1968 to 1985 time frame. PPBS documents pertinent to the indictment include the following:

a. DEFENSE GUIDANCE: Defense Guidance was issued by the Office of the Under Secretary of Defense (Policy). It was the final output of the planning phase of the PPBS.

b. PROGRAM OBJECTIVE MEMORANDUM: Each military department, including the Air Force, the Navy and the Army, prepared and submitted to the Secretary of Defense a Program Objective Memorandum (hereafter "POM"), a DOD programming document which was consistent with the strategy and guidance stated in Defense Guidance and other DOD planning documents.

c. ISSUE BOOKS AND ISSUE PAPERS: Each military department's POM was reviewed and evaluated by the Defense Resources Board (hereafter "DRB"). The DRB was chaired by the Deputy Secretary of Defense, and its members included the Under Secretary of Defense (Policy), the Under Secretary of Defense (Acquisitions),

several Assistant Secretaries of Defense, the Comptroller of the Department of Defense, the Secretaries of the Army, Navy and Air Force, the Chairman of the Joint Chiefs of Staff, and the Assistant Director of the Office of Management and Budget for National Security. The DRB evaluated the POM of each department and made a series of programming recommendations to the Deputy Secretary of Defense. In evaluating the POM of each department, the DRB relied upon a set of Issue Books and Issue Papers prepared by interdepartmental issue teams.

d. PROGRAM DECISION MEMORANDUM: The DRB's recommendations were contained in a series of Program Decision Memoranda (hereafter "PDM"). The approved PDMs were signed by either the Secretary of Defense or the Deputy Secretary of Defense.

e. FIVE YEAR DEFENSE PROGRAM: The Five Year Defense Program (hereafter "FYDP") was the DOD's primary document summarizing the total resources planned, programmed and budgeted by the DOD. The FYDP was issued three times a year, first in conjunction with the PPBS programming phase, second in conjunction with the budget submissions by each service to the Secretary of Defense and, third, in connection with the final DOD budget. The FYDP contained the budget of the immediate year past, the budget of the current year, and the budgets for the following five years. For example, the FYDP issued in May, 1984 contained the actual budgets for fiscal year (hereafter "FY") 1984 and FY 1985, and the anticipated budgets for FY 1986 through FY 1990.

29. All of the documents described above possessed certain common characteristics:

a. The documents were internal planning, programming or budgeting documents of the DOD.

b. The documents were classified SECRET.

c. The documents were not authorized by the DOD for release to and exchange among defense contractors such as Hughes, Raytheon and RCA.

COUNT ONE

(CONSPIRACY)

(18 U.S.C. §371)

1. The grand jury realleges and incorporates by reference the General Allegations of the indictment as though the same were fully set out in this count of the Indictment.

OBJECTS OF THE CONSPIRACY

2. Beginning in or about the early 1970's, and continuing through a portion of the year 1986, the exact dates being unknown to the Grand Jury, in the Eastern District of Virginia and elsewhere, defendant FRANK J. CASO and defendant JOHN R. KIELY, together with persons and entities known and unknown to the grand jury, did willfully, and knowingly and unlawfully combine, conspire, confederate and agree together to defraud the United States and to commit certain offenses against the United States; that is, to:

a. Defraud the United States and departments and agencies thereof, in particular the DOD, in their performance of certain lawful government functions, to wit, maintaining control of certain classified PPBS documents, restricting the dissemination of these documents to authorized personnel, and protecting these documents from unauthorized disclosure;

b. Defraud the United States and departments and agencies thereof, in particular the DOD, by impeding, impairing, obstructing, defrauding and corrupting the DOD's lawful governmental functions of: (1) maintaining a system for classifying and safeguarding the secrets of the DOD; (2) regulating a system by which defense contractors and their employees are permitted to possess certain classified documents under DOD regulations and scrutiny; and (3) granting and renewing security clearances for individuals whom the Department of Defense deems appropriate; and

c. Violate Title 18 United States Code Section 641 (conveyance without authority of property of the United States or any department or agency thereof).

* * * *

(Remaining allegations of indictment redacted)

A TRUE BILL:

/s/ Dennis E. Howard, Jr. 3/21/90
FOREPERSON

/s/ Henry E. Hudson
HENRY E. HUDSON
UNITED STATES ATTORNEY

/s/ Randy I. Bellows
Randy I. Bellows
Assistant United States Attorney

/s/ Deborah A. Kent
Deborah A. Kent
Special Assistant
United States Attorney

DEFENDANTS' SUPPLEMENTAL REQUEST NO. 1

THEORY OF THE DEFENSE

If the evidence in this case leaves you with a reasonable doubt as to whether the Department of Defense had either officially or unofficially released the PPBS documents relevant to this case to defense contractors, you must find the Defendants not guilty.

DEFENDANTS' SUPPLEMENTAL REQUEST NO. 2

THEORY OF THE DEFENSE

If the evidence in this case leaves you with a reasonable doubt as to whether the Defendants in good faith reasonably believed that the Department of Defense had either officially or unofficially released the PPBS documents relevant to this case to defense contractors, or that the Defendants in good faith reasonably believed that they were authorized to receive and convey such documents, you must find the Defendants not guilty.

DEFENDANTS' SUPPLEMENTAL REQUEST NO. 3

THEORY OF THE DEFENSE

If the evidence in this case leaves you with a reasonable doubt as to whether Frank Caso reasonably relied in

good faith upon the advice of the Hughes Aircraft Company (management and/or security) in his receipt, handling, and conveyance of the PPBS documents relevant to this case, you must find him not guilty.

COPY

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA -vs- FRANK J. CASO and JOHN R. KIELY, Defendants.	CRIMINAL ACTION NO. 90-98-A

Thursday, June 21, 1990

Alexandria, Virginia

Transcript of the Judge's instructions to the jury in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

(As heretofore noted:)

PROCEEDINGS

THE COURT: Members of the jury, now that you have heard the evidence and counsel's argument, the time has come to instruct as to the law governing the case. You, as jurors, are the sole judges of the facts; and, therefore, what the Court or the lawyers say to you regarding the

evidence or their recollection of the evidence is not binding on you. You are, however, duty bound to follow the law as stated in the instructions and to apply that law to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law but should consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. Regardless of what you might think the law ought to be, it would be a violation of your sworn duty as a juror to base a verdict upon any other view of the law than that given in the instructions.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment, the charge, on the one hand and the denial of those allegations made by the defendants' not-guilty pleas on the other hand. You are to perform this duty without bias or prejudice as to the any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the defendants and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

Statements and argument of counsel are not evidence in the case, unless made as an admission or stipulation, and you have evidences of that in the evidence of exhibits. Other than the stipulations, the evidence in the case consists of the sworn testimony of the witnesses and any exhibits which have been received in evidence. Any evidence as to which an objection was sustained, and any

evidence ordered stricken by the Court must be entirely disregarded.

You are of course to consider only the evidence in the case, but in your consideration of that evidence, you are not limited to the bare statements of the witnesses. On the contrary, you are permitted to draw from the facts you find have been proved such reasonable inferences as seem justified in the light of your own experience.

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witnesses has testified, and every matter which tends to show whether a witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether the witness impresses you as having an accurate recollection of those matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which if at all each witness is either supported or contradicted by other evidence in the case.

You may also consider any prior inconsistent statements if proven by the evidence. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of several witnesses may or may not cause you to discredit that testimony. Two or more persons seeing an incident or witnessing a transaction may see or hear it

differently, and you are reminded that innocent misrecollection, like failure of recollection, is not an uncommon occurrence.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether it results from innocent error or intentional falsehood.

A defendant who testifies is a competent witness, and his credibility and the weight to be given his testimony are to be judged in the same way as that of any other witness.

The indictment, and you will have the indictment before you in the case, charges the conspiracy between the defendants and others to commit certain offenses against the laws of the United States.

The indictment is drawn pursuant to a provision of the United States Code which provides that if two or more persons conspire to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the laws of the United States.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, so a conspiracy is a kind of partnership in criminal purposes, in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey or disregard the law.

Mere presence at the scene of an alleged transaction or event or mere similarity of conduct among various persons and the fact that they may have associated with each other any may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. However, the evidence in the case need not show that members entered into any express or formal agreement or that they directly by word spoken or in writing stated between themselves what their object or purpose was to be or the details thereof, or the means by which the object or purpose was to be accomplished.

What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

If you should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy, one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy charged is complete and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

An element of the offense charged in the indictment is that the defendants acted willfully, and that term and the term knowingly is used throughout the instructions.

An act is done willfully if done voluntarily and intentionally and with a specific intent to do something the law forbids, that is with a purpose to disobey or disregard the law. In the case of a conspiracy, it is a concerted purpose or agreement to do those act or acts which constitute a violation of the law. In this connection, it is not necessary that a defendant know that there is a particular statute which makes it a violation of the law, but he must specifically intend and agree to do something the law forbids.

An act is done knowingly if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The indictment charges that the conspiracy had three different objects. The Government is not required to prove all three of the objects. It is sufficient if the Government proves that the conspiracy had as its purpose the achievement of at least one of the objects, one of the three objects set forth in the indictment.

Moreover, you must unanimously agree as to at least one of the objects. For example, some of you could not agree that an object of the conspiracy was one of the three and others agree that it was another of the three. You must unanimously agree on at least one of the objects of the conspiracy.

The first object charged in the indictment is to defraud the United States, and the department and agencies thereof, in particular the Department of Defense in their performance of certain lawful governmental functions, specifically maintaining control of certain classified PPBS documents, restricting the dissemination of those documents to authorized personnel and protecting those documents from unauthorized disclosure.

The second object charged in the indictment, and you will have the indictment before you, is to defraud the United States and department and agencies thereof, in particular the Department of Defense, by impeding, impairing, obstructing, defrauding and corrupting the DOD's lawful governmental function of one, maintaining a system for classifying and safeguarding the secrets of the DOD; two, regulating a system by which defense contractors and their employees are permitted to possess certain classified documents under DOD regulations and scrutiny; and three, granting and renewing security clearances for individuals whom the Department of Defense deems it appropriate.

The third object charged in the indictment is to violate a specific substantive criminal section of the United States Code, which is known as conveyance without authority of property of the United States.

The first two objects charge a conspiracy to defraud the Government and particularly the Department of Defense. The charge of conspiracy to defraud the Government does not mean that one of the illegal objects must be to cause the Government to suffer a loss of money or property as a consequence of the conspiracy, nor is it

necessary that the defendants have been motivated by the desire to make money or to receive some financial benefit for their unlawful conduct.

Rather, a conspiracy to defraud is a conspiracy where the object is to obstruct, interfere, impair, impede or defeat a lawful function of the Government through fraudulent or dishonest or deceptive means.

The first object of the conspiracy sets out a number of lawful Government functions relating to the DOD's planning, programming and budgeting system. The second object of the conspiracy sets out a number of lawful governmental functions relating to the DOD's industrial security system. I instruct you that the functions set forth in the first and second objects of the indictment are lawful Government functions. You must therefore determine if the defendants through fraudulent or dishonest or deceptive means sought to obstruct, interfere, impair, impede, or defeat one of those lawful Government functions.

By fraudulent is meant done with an intent to deceive or cheat.

The third object that is charged as an object of this alleged conspiracy is a conspiracy to violate a section of the United States Code, which provides in part that whoever without authority conveys any record or thing of value to the United States or any department or agency thereof shall have committed an offense against the laws of the United States.

It is important to remember that the defendants are not charged with violating that section. They are charged

with conspiring to violate that section. And that is an important distinction. The crime of conspiracy to convey without authority is an independent offense, separate and distinct from the actual violation of conveyance without authority. Indeed, you may find the defendant guilty of the crime of conspiracy to convey without authority, even though the substantive crime which is the subject of the section I just read you was not actually committed, and indeed it is not charged that it was committed in this indictment. But you should know what the elements of that offense are since the defendants are charged with conspiring to violate it.

The elements of conveyance without authority are as follows: one, that the defendant willfully and knowingly as I have defined those terms, conveyed or caused to be conveyed a record or thing of value to the United States or a department or agency thereof; that that defendant did so without authority; and the definition of some of these terms is as follows: the term conveyed means to give, transmit, carry, pass or otherwise provide some item to someone or some company. It is not required that the Government identify or prove the identity of the specific person to whom the conveyance was made. The Government need not prove that a defendant personally conveyed the document in question if he caused another person to convey them. A defendant causes an act to be committed when he takes a step which he knows in the regular course of events will result in that act being committed.

The term without authority means the conveyance was made without the permission and consent of a Government official who is actually authorized to give that

consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

In this case, the Government alleges that the documents conveyed were classified secret. The documents classified at the secret level may be conveyed only if the conveyance is made with permission and in an authorized manner. In other words, a conveyance would be without authority if either the defendant conveyed the document without obtaining permission from an appropriate Government official, or the actual conveyance was made in a manner that violated Government regulation authorizing the dissemination of classified material.

It is not enough, however, for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was without lawful authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

In order for the Government to prove a defendant guilty of conspiracy to convey without authority, the Government is not required to prove where the defendant got the document from or who gave it to him or even if the defendant obtained the document directly from a Government employee. It is sufficient for the Government to prove that the original document was created by and belonged to the Government, regardless of where or from whom the defendant actually obtained his copy of the document.

A defendant may be guilty of conspiracy to convey without authority even if his initial acquisition of the document was lawful and with authority; thus there is no obligation that the Government establish that a document was obtained by the defendant by theft or by other unlawful means. An item may be obtained lawfully but still conveyed without authority.

Similarly, even though a document may be lawfully acquired, an illegal conveyance takes place when it is transferred without authority to another person or company.

It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all of the circumstances. It is not a defense to the charge of conspiracy to convey without authority that other individuals engaged in similar conduct, nor is it a defense that a defendant's employer approved of what he was doing or even ordered him to do it as a condition of employment, except insofar as that approval bears on the reasonableness of the defendant's belief that he was authorized to convey.

Nor is it a defense that society might have been better served had these documents been made more widely available or that the documents in question or similar documents were leaked on other occasions, or that information in the documents had already been disclosed publicly, nor is it a defense that individuals in the Government could have or should have been more vigorous in preventing or stopping the conduct in question.

It is not a defense that the document in question was conveyed to an individual with a security clearance, if the conveyance was without authority.

I have listed a lot of things that are not a defense. However, while they may not be a defense, they are matters which you may consider in determining whether the defendant reasonably believed that he had the authority to convey it.

As I said, the defendant's conduct must have been knowingly, done knowingly as well as willfully. The word knowingly is added to insure that no one will be convicted in this Court or any other Court because of some mistake or accident or other innocent reason on the part of the defendant.

It is not a defense, however, that the defendants may have miscalculated the penalty for their conduct, or may have believed that they would not be subject to criminal prosecution.

I instruct you further that you may infer the defendant acted knowingly if you conclude that the defendant had a conscious purpose as opposed to negligence or mistake to avoid learning an existing fact. That you may infer this however does not relieve the Government of the duty to or the obligation to prove both that the defendant acted knowingly and willfully by proof beyond a reasonable doubt.

In defining the term willfully, I said the defendant must have acted with specific intent. Specific intent, as the term implies, means more than the general intent to

commit an act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Such intent may be determined from all the facts and circumstances surrounding the case. An intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operation of the human mind. You may infer a defendant's intent from the surrounding circumstances. You may consider any statement made or done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.

As indicated, the evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all the means and methods which were agreed upon were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is the alleged conspiracy was willfully formed and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment, and that two or more persons including the defendant that you then have under consideration were knowingly members of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all of the details of that conspiracy, and

even though he does not know the existence or identity of all of his co-conspirators. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before you may find that a defendant or any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was willfully formed, and that the defendant or other person who is claimed to have been a member willfully participated in the unlawful plan with the intent to advance or further some object or purpose of that conspiracy.

So if a defendant or any other person with the understanding of the unlawful character of a plan knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

Whenever it appears beyond a reasonable doubt from the evidence in the case that the conspiracy charged existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member may be considered by you as evidence in the case as to the defendant found to have been a member, even though the statement and act may have occurred in the absence and without the knowledge of the defendant, provided that such statement and act

were knowingly made and done during the continuance of the conspiracy and in furtherance of some object or purpose of the conspiracy charged.

Five essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment: first, the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged; second, that the defendant that you then have under consideration willfully became a member of that conspiracy; third, that while the conspiracy was in existence, one of the conspirators knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; fourth, that such over act was knowingly done in furtherance of some object or purpose of the conspiracy; and fifth, that at least one of the over acts alleged in the indictment occurred within five years prior to the return date of the indictment, that is on or after March 12, 1985.

In your consideration of the evidence in the case, you should first determine whether the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the defendant that you then have under consideration willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed and that the defendant you then have under consideration willfully became a member of it, either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in

furtherance of some object or purpose of the conspiracy, then there may be a conviction, even though the conspirators may not have succeeded in accomplishing their common object or purpose or in fact may have failed in so doing.

The extent of a defendant's participation moreover is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in that conspiracy.

An overt act is a requirement, an element of the offense, is any transaction or event, even one that may be entirely innocent when considered alone, which is knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. An overt act may be as innocent as the act of a man walking across a street or driving an automobile or using a telephone or mailing a letter. It may even be causing a nonconspirator to unwillingly do some act.

It must however be an act which is knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment. There are 146 overt acts charged in this indictment. In order for the Government to satisfy this element, it is not required that all of the overt acts alleged in the indictment be proved. The Government must prove only that at least one overt act was committed in furtherance of the conspiracy. Moreover, it must also prove and you must unanimously agree on that one act. It would not be sufficient for some but not all of you to agree on one act and some but not all of you to agree on another act. All of you have to agree on at least one overt act.

You need not find that the defendant however committed the act. It is sufficient for the Government to show that one of the conspirators, even a conspirator who is not charged in the indictment, knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes in the eyes of the law the act of all members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place alleged.

You have heard the term "statute of limitations," and the five years and on or about, on or after March 21, 1985. The statute of limitations requires that the Government prove that the conspiracy existed, continued in existence as of five years prior to the date of the indictment. This indictment was returned, that is rendered by the Grand Jury on March 21, 1990. Therefore, the Government must prove that the conspiracy continued in existence as of March 21, 1985.

In order to meet its burden the Government need not prove that the bulk of the overt acts was committed on or after March 21. Indeed, the evidence may prove that the conspiracy was largely completed more than five years ago, as long as the conspiracy extended into the five-year limitation period.

Nor must the Government prove an individual defendant committed an overt act on or after March 21, 1985, as long as he remained a member of the conspiracy at the time of the commission of the overt act by another

conspirator. The Government must prove that some member of the conspiracy in furtherance of the conspiracy committed at least one of the over acts named in the indictment on or after March 21, 1985, and that the defendant was a member of the conspiracy at the time the overt act was committed.

Again, you must unanimously agree on the overt act that occurred on or after March 21, 1985 if one did so occur.

The indictment charges a conspiracy among the defendants and others, some of whom are named in the indictment and some of whom are not. A person cannot conspire with himself, and therefore you cannot find either of the defendants guilty unless you find beyond a reasonable doubt that he participated in a conspiracy as charged with at least one other person, whether a defendant or not and whether named in the indictment or not.

The defendant, Mr. Kiely, has raised the defense that he was not a member of the conspiracy because he withdrew from it. Once a person joins a conspiracy, that person remains a member until he withdraws from it. Any withdrawal must be complete and it must be in good faith. In order to withdraw from a conspiracy, there must be affirmative acts inconsistent with the object or objects of the conspiracy and a communication of those acts in a manner reasonably calculated to reach the coconspirators.

As indicated, the withdrawal must be complete. If the Government proves beyond a reasonable doubt that the defendant after the supposed withdrawal committed an overt act in furtherance of the conspiracy, whether that

overt act is listed in the indictment or not, the withdrawal would not be complete.

As also indicated, a withdrawal must be in good faith. With regard to withdrawal, you are reminded that the burden remains on the Government to prove beyond a reasonable doubt that the defendant was a member of the conspiracy and did not withdraw from it prior to March 21, 1985.

You have heard testimony from some Government witnesses who may have pled and who did I believe plead guilty to charges arising out of facts similar to those alleged in this case. You are instructed that you are to draw no conclusion or inference of any kind about the guilt of these defendants from the fact that some prosecution witness may have pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his or her own guilt.

There has been evidence of certain regulations, manuals, directives, orders and the like. Although the indictment alleges that the defendants failed to act in compliance with the Industrial Security Manual and other regulations, the indictment does not charge that violation of these regulations is a crime. Violation of these regulations is not a crime absent the required criminal intent.

The United States has introduced one or more witnesses or persons as witnesses who according to their own testimony participated in the offense charged in the indictment. Such person or persons occupy the position of accomplices. Other persons testified who have been granted immunity.

It is a general principle in considering the credibility of witnesses that the testimony of accomplices or persons who provide evidence against a defendant for immunity from punishment is open to suspicion that they may be actuated by self interest. Such testimony should be carefully weighed and tested before giving it unlimited credence, and it is not safe to accept it as conclusive unless it is corroborated by the testimony of other persons or by facts and circumstances clearly tending to support it.

However, you are told that such testimony is competent evidence and it is for you to pass upon its credibility, and if the testimony carries conviction, and you are convinced of its truth, you should give to it the same effect as would be allowed to a person who is in no respect implicated in the offense and who has not been granted immunity.

Such testimony if you are convinced of its truth will support a conviction even though it is uncorroborated if it convinces you of a defendant's guilt beyond a reasonable doubt.

You are told that as to both defendants and to this charge that whenever a defendant comes into Court charged with a crime, he is presumed by law to be innocent. That presumption is an abiding one, and remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce

any evidence. If the Government fails to prove a defendant guilty beyond a reasonable doubt, then you must find him not guilty.

The law does not require absolute certainty nor proof beyond all possibility of mistake. It does require however proof beyond a reasonable doubt, and proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her other affairs.

A defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances, not themselves in issue, but from which from experience and reason, the existence of a fact in issue may be inferred.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that the jury after weighing all the evidence must be convinced of the defendant's guilt beyond a reasonable doubt before you can find him guilty.

The indictment which you will have before you is not evidence of the defendant's guilt. It is merely the formal manner by which the Government accuses a person of a crime in order to bring him to trial. You must not be prejudiced against a defendant because an indictment has been returned against him.

When you retire to consider your verdicts, you will take with you the exhibits and a form of verdict which

has been prepared for you. Insofar as that verdict is concerned, if you find a defendant not guilty, you should say so and no more. If you find him guilty, you should say so and no more.

In determining his guilt or innocence, you should give no consideration to the matter of punishment, since in the Federal system unlike in the Virginia State Courts, the juries do not fix punishment. Your sole inquiry is whether a defendant is guilty or not guilty.

The defendants have been charged together but they should – guilt or innocence should be considered separately. You should give separate consideration and of course render separate verdicts as to each defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him as though he was being tried alone.

If you find the defendant guilty beyond a reasonable doubt of any one of the crimes charged in the indictment, the verdict of guilty should be returned as to him. The guilt or innocence of either of the defendants should not influence your verdict with respect to the other defendant.

You should confine yourself to the charges contained in the indictment. The defendants are not on trial for any act or conduct not alleged in that indictment.

A last word concerning your verdict: as you know if you have sat on juries before, in order to return a verdict, it must be unanimous. Each of you must agree to it. Do not be concerned that each of you cannot remember everything that was said. That's why we have 12 jurors

instead of one. No one juror is expected to remember everything that was said, but some of you will remember parts of it, and that will remind others of other parts of it, and collectively you can put together the important aspects of the case.

And you will have to rely on your recollection, since it will not be permissible to begin reading back to you portions of the testimony.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement that is having as your aim the ultimate arriving at a verdict if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is an erroneous opinion, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence you have heard here in Court.

Counsel approach the Bench.

* * * *

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

UNITED STATES CODE

Title 18, Section 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

June 25, 1948, c. 645, 62 Stat. 701.

UNITED STATES CODE

Title 18, Section 641

Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted –

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

June 25, 1948, c. 645, 62 Stat. 725

Nos. 91-374 and 91-620

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it is not a defense to the charge of conspiring to convey government property without authority that the defendants had permission to convey the property from a government employee who lacked the authority to give such permission.

2. Whether the district court properly declined to give a jury instruction that the existence of a "good faith" belief on the part of the defendants that they were authorized to convey government property is a defense to the charge of conspiracy to convey such property without authority.

3. Whether the district court properly informed the jury of the elements of the substantive offense that petitioners were charged with conspiring to violate.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-374

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-626

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26)[1] is unpublished, but the decision is noted at 935 F.2d 1288 (Table).

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[1] "Pet. App." refers to the appendix to the petition in No. 91-374.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. A petition for rehearing was denied on July 23, 1991. Pet. App. 27-28. The petition for a writ of certiorari in No. 91-374 was filed on September 3, 1991. The petition for a writ of certiorari in No. 91-626 was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of conspiring to defraud the United States by interfering with lawful government functions and conspiring to violate 18 U.S.C. 641 by conveying property of the United States without authority, in violation of 18 U.S.C. 371. Petitioners were sentenced to two years' imprisonment, all but six months of which was suspended in favor of probation, and a $5,000 fine. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1-26.

1. The evidence at trial showed that petitioner Caso worked as a market researcher for Hughes Aircraft Co., a defense contractor. Petitioner Kiely worked as a market researcher for Raytheon Corp., also a defense contractor. Both held "secret" security clearances because their jobs included receiving and handling classified documents given to them by government officials.

Together with others, petitioners engaged in a conspiracy to conduct an "underground market" in internal budgeting and planning documents that the Department of Defense (DOD) used to reach decisions on its funding priorities. Pursuant to the

scheme, one defense contractor employee would obtain critical budget documents from a source at DOD, make a copy, and then pass the documents on to a friend or colleague who worked for another defense contractor. Pet. App. 9, 13.

Some of the documents improperly acquired or traded by petitioners were sent from the Secretary of Defense and his deputy directly to the secretaries of the military departments to describe the goals to be achieved by DOD. Other documents came from the military departments and were created in response to the Secretary's directives; these documents outlined how each department would allocate its resources. Some documents reflected debates within the Pentagon on budget priorities, while other documents indicated final decisions on budgets and program funding. In the aggregate, the documents revealed the thought processes of DOD on critical funding issues, and thus constituted an invaluable resource for defense contractors. Pet. App. 3.

The documents at issue were internal DOD documents that were not to be released to defense contractors. Each document contained a substantial number of pages marked "secret." In addition, the documents contained such warnings as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "REPRODUCTION OF THIS DOCUMENT IN WHOLE OR IN PART IS PROHIBITED EXCEPT WITH THE PERMISSION OF THE ISSUING OFFICE." Through the ongoing security clearance process petitioners were frequently made aware of the procedures regulating the handling and distribution of classified material. Pet. App. 4.

Petitioners took extraordinary measures to avoid detection. They falsified the names and sources of

the documents in their companies' document control systems; they removed the "secret" and "confidential" markings from the documents; they maintained separate mail boxes to receive documents; they mailed "secret" documents to fellow defense contractor researchers at home; they took elaborate steps to hide the documents when their offices were inspected by DOD investigators; and they exchanged the documents in surreptitious ways. Pet. App. 5 & n.*.

2. The indictment charged that petitioners' conspiracy had three objects: (1) to defraud the United States by unlawfully interfering with the DOD's planning, programming, and budgeting function; (2) to defraud the United States by unlawfully interfering with DOD's industrial security system; and (3) to convey without authority property of the United States, in violation of 18 U.S.C. 641. Pet. App. 46-48, 57-58. One of petitioners' defenses to the charge of conspiracy to convey government documents without authorization was that they obtained the classified documents as part of an "informal DOD policy" to place sensitive but helpful budget documents in the hands of defense contractors. *Id.* at 4. Pursuant to that defense, petitioners asked the district court to instruct the jury that it should acquit if the evidence left a reasonable doubt as to whether DOD "either officially *or unofficially*" released the classified documents to petitioners. Pet. 16 (emphasis added).

The district court declined to give the requested instruction, ruling that unofficial authorization was not a valid defense. Pet. App. 21. Instead, the court instructed the jury that

> [t]he term without authority means the conveyance was made without the permission and consent of a Government official who is actually

> authorized to give that consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

Id. at 59-60.

Petitioners also requested the district court to instruct the jury that it should acquit if it found that the defendants "in good faith reasonably believed" that they were authorized to convey the classified documents. Pet. App. 49. The court refused to give such a good faith instruction with respect to the conspiracy to defraud the United States, holding that good faith was not a defense. *Id.* at 24. The court, however, instructed the jury that it must find that the defendant acted fraudulently in conspiring to defraud the United States, and that "fraudulent" means "done with an intent to deceive or cheat." *Id.* at 58. The court also instructed the jury with respect to the overall conspiracy that, in order to convict, it must find that the defendant acted "willfully"—that is, "voluntarily and intentionally and with a specific intent to do something the law forbids"—and "knowingly"—that is, "voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Id.* at 56.

With respect to the conspiracy to convey government property without authority, the court, without using the term "good faith," gave the following instructions:

> It is not enough * * * for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was

without legal authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

* * * * *

It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all of the circumstances. * * *

* * * * *

[Y]ou may infer that the defendant acted knowingly if you conclude that the defendant had a conscious purpose as opposed to negligence or mistake to avoid learning an existing fact. That you may infer this however does not relieve the Government of the duty to or the obligation to prove both that the defendant acted knowingly and willfully by proof beyond a reasonable doubt.

In defining the term willfully, I said the defendant must have acted with specific intent. Specific intent, as the term implies, means more than the general intent to commit an act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Pet. App. 60, 61, 62-63.

3. On appeal, petitioners challenged the district court's refusal to instruct the jury on the defense of "unofficial authorization." The court of appeals agreed with the district court that unofficial authorization is not a valid defense to a charge of conspiring to convey government property without authorization; accordingly, the court found that the district court properly refused to give such an instruction. Pet. App. 21. The court of appeals also stated that

the instructions to the jury made clear that the government had to show either that the defendants knew they lacked official authorization, or that they acted with reckless disregard in failing to know that fact; that negligence or mistake on the defendants' part was not enough; and that knowledge could be inferred if the defendants had a conscious purpose to avoid learning the truth. *Id.* at 22-23. The court concluded that those instructions accurately stated the law and protected against conviction any person who reasonably believed that he acted with authority or was no more than negligent in failing to know that he lacked authority. *Ibid.*

The court of appeals also rejected petitioners' claim that the district court had erred in failing to give a good faith instruction. The court noted that, fairly read, the instruction that the unauthorized conveyance of government property must have been done willfully and with knowledge or reckless disregard "logically carries over" to the other objects of the conspiracy, because "the conspiracy to defraud the government by compromising its classified document system necessarily involves conveying of documents." Pet. App. 24-25. Moreover, the court of appeals determined that "the so-called good faith defense is logically and legally incompatible with a standard instruction on willful conduct," because "a defendant cannot act with 'a purpose to disobey the law' and yet 'believe[] in good faith that his actions were legal'—the former being the actual jury instruction and the latter being the instruction sought by defendants." *Id.* at 25. The court also found that "the so-called good faith instruction is subsumed in the charge that a defendant cannot be convicted unless the jury finds that he acted with 'purpose to disobey or disregard

the law.'" *Ibid.* The court therefore concluded that the "instruction sought would have been superfluous." *Ibid.*

ARGUMENT

1. Petitioners contend (91-374 Pet. 15-19; 91-626 Pet. 14-18) that the district court erred in declining to instruct the jury on "unofficial authorization," and instructing instead that it was no defense to the charge of conspiracy to convey government documents without authorization that the defendants received permission from a government employee who had no actual authority to give such permission.[2] The instruction petitioners desired, however, is contrary to the requirements governing the dissemination of DOD documents.

DOD Directive 7045.14 (May 1984) provides that budgetary data of the type contained in the documents at issue here "may not be released outside the Executive Branch of the government without the expressed written consent of the Assistant Secretary of Defense (Comptroller)." C.A. Joint App. 490. Many

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[2] Although petitioners contend that the evidence showed the existence of an unofficial, authorized system for distributing classified budgetary material to contractors, the testimony established nothing of the kind. Petitioners rely primarily on the testimony of two DOD officials, Carolyn Chewning and Thomas Christie. But the testimony of Chewning on which petitioners rely was given at a different trial six years earlier. In the instant case, she testified that her previous testimony was the result of confusion, that documents of the sort involved here are not releasable to DOD contractors, and that she had never seen such material released unofficially. Gov't C.A. Br. 12-13. Christie testified that, while he had released classified budgetary material to an employee of Grumman, he had done so solely on his own initiative and without authority. *Id.* at 13.

of the documents disseminated by petitioners carried warnings reflecting the substance of that directive, such as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "the DOD estimates contained in this issue will not be furnished to anyone outside the executive branch without . . . express written consent." Pet. App. 4, 9. In light of the DOD directive, any form of "unofficial authorization," without the written consent of the Assistant Secretary of Defense, was no authorization at all. Accordingly, the district court was correct in refusing to give an "unofficial authorization" instruction.

In support of their position that they did not need official permission to convey the classified documents, petitioners rely on DOD's *Industrial Security Manual for Safeguarding Classified Information* (1985), (ISM), which establishes the requirements for acquisition, dissemination, and handling of classified information by contractors and their subcontractors, vendors, and suppliers. GX 20-S. In particular, petitioners insist (91-374 Pet. 19; 91-626 Pet. 17-18) that ISM § 3(e) gives any "possessor" of a classified document the unrestricted authority to determine the propriety of further dissemination based upon a need to know and an appropriate security clearance.[3] Sec-

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[3] ISM § 3(e), GX 20-S, at 4, defines the term "[a]uthorized [p]ersons" to mean

> those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information * * *. Responsibility for determining whether individuals' duties require that they possess, or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients.

tion 3(e), however, presupposes that the person who conveys a classified document is authorized to possess the document in the first place;[4] petitioners' contrary reading leads to the absurd result that a person who comes to possess a document unlawfully has the authority to disseminate it further. Here, petitioners admitted possessing the classified documents without the requisite written consent of the Assistant Secretary of Defense; therefore, their dissemination of the documents was not protected by ISM § 3(e).

2. Petitioners also contend (91-374 Pet. 19-25; 91-626 Pet. 18-23) that the district court erred in refusing to give a separate instruction to the jury that it was a defense to the conspiracy charge that they had acted in "good faith." The court of appeals correctly held that the instructions on willfulness, knowledge, and specific intent were adequate to guide the jury's deliberations, without a separate good faith instruction. Pet. App. 24-25.

In the context of criminal tax prosecutions, this Court has held that, when the jury is adequately instructed on willfulness, an additional instruction on good faith is unnecessary. *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991); *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam). Because willfulness in that context means "a voluntary, intentional violation of a known legal duty," the Court held that a willfulness instruction already incorporates the element of bad faith or evil motive.

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[4] ISM § 3(e) applies only to "classified information," which is defined as information that is designated as such; information that is owned or controlled by the government; and information that is determined under applicable executive orders to require protection against "unauthorized disclosure." ISM § 3(k), GX 20-S, at 4.

111 S. Ct. at 610; see *Pomponio*, 429 U.S. at 12. The same principle has been applied more generally to criminal statutes requiring proof that the defendant acted with specific intent. As one court of appeals has explained, "where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, No. 90-2224 (1st Cir. Sept. 5, 1991), slip op. 5; accord *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 474 U.S. 925 (1985); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *United States* v. *Rothman*, 567 F.2d 744, 752 (7th Cir. 1977); cf. *United States* v. *McGuire*, 744 F.2d 1197, 1201, 1202 (6th Cir. 1984) (finding any error in failing to instruct on good faith to be harmless because "[t]he instructions with regard to specific intent adequately informed the jury of the defendants' theory of the case"), cert. denied, 471 U.S. 1004 (1985).

Petitioners assert that the Fifth, Eighth, and Tenth Circuits require a good faith instruction to be given even if the jury is instructed on willfulness and specific intent, and that the rule followed by those courts conflicts with the decision in this case. 91-374 Pet. 21; 91-626 Pet. 19, citing, *inter alia*, *United States* v. *Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985); *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc). See also *Green* v. *United States*, 474 U.S. 925 (1985) (White, J., dissenting from the denial of certiorari). Petitioners overstate the extent of the circuit split. The Fifth Circuit has abandoned the rule advanced in

United States v. *Goss*, *supra*, that a separate good faith instruction is required. See *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986); *United States* v. *Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990). As the First Circuit has observed, "[i]f there is a discernible trend on this issue, it seems to be moving against" the requirement of a separate instruction on good faith. *United States* v. *Dockray*, slip op. 6. In any event, this case does not present the issue on which the courts of appeals have disagreed. In none of the cases cited by petitioners did the district court, in addition to instructing on willfulness and specific intent, give an instruction that clearly set forth the good faith defense although not using that specific phrase. That is the case here.

The district court's instructions set forth in detail the requirements of willfulness, knowledge, and specific intent. Pet. App. 56, 62-63. In addition, the instructions conveyed the essence of petitioners' proposed instruction that the jury should acquit if it found that petitioners "in good faith *reasonably* believed" that they were authorized to convey the classified documents. *Id.* at 49 (emphasis added). The court instructed the jury that "[i]t is a defense to a charge of conspiracy to convey without authority that the defendant * * * believed he had authority, and that this belief was reasonable under all of the circumstances." *Id.* at 61.[5] It is well settled that

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[5] Petitioners take issue (91-374 Pet. 25; 91-626 Pet. 23) with the "reasonableness" requirement in the court's instruction. But petitioners' present objection to the "reasonableness" instruction constitutes an about-face from their position in the district court; their own proposed good faith instruction contained just such a reasonableness requirement. Pet. App. 49.

the district court has considerable latitude in the manner in which an instruction is formulated and that it need not adopt the precise wording of the defendant's proposed instruction. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 110 S. Ct. 1300 (1990); *United States* v. *McGuire*, 744 F.2d at 1201; *United States* v. *Gaines*, 690 F.2d 849, 856-857 (11th Cir. 1982). The difference between the good faith instruction proposed by petitioners and the instruction given by the district court is not one of substance.[6]

Petitioners also argue (91-374 Pet. 22-23; 91-626 Pet. 21-23) that the district court gave no instructions on good faith with respect to the conspiracy to defraud the United States. The court of appeals, however, correctly explained that the charge of conspiracy to defraud the United States by compromising its classified document system was predicated on petitioners' unauthorized conveyance of the classified documents. Accordingly, the court concluded that the instructions discussed above—that the defendants could be convicted only if the jury found that they

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[6] Relying on two Fourth Circuit decisions, petitioners argue (91-374 Pet. 25; 91-626 Pet. 23) that the district court should not have told the jury that it could convict if it found that they "acted with reckless disregard as to whether the conveyance was authorized." There was no danger, however, that the jury might have been misled into convicting petitioners for carelessness as opposed to knowing misconduct. The court also instructed the jury that the requisite state of mind for conviction required that petitioners had "a conscious purpose as opposed to negligence or mistake to avoid learning" the truth. Pet. App. 62. Reading the jury instructions as a whole, the conscious purpose instruction ensures that the reckless disregard instruction did not permit a conviction for negligence. See *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991).

acted willfully and with knowledge that they did not have authorization for the conveyance—"applie[d] with full force to all the offenses charged." Pet. App. 24-25. The same analysis applies to the instruction that it was a defense to the unlawful conveyance charge that the defendant had a reasonable belief under all of the circumstances that he was authorized to make the conveyance. *Id.* at 61.

3. Finally, petitioners contend (91-374 Pet. 25-26; 91-626 Pet. 23-24) that, in instructing the jury on the conspiracy charge, the district court improperly set out the elements of the substantive offense that petitioners were charged with conspiring to violate—unlawful conveyance of government property under 18 U.S.C. 641. That claim is without merit. The district court carefully instructed the jury on the crime of conspiracy, Pet. App. 54-56, and prefaced its instruction on the elements of Section 641 with the following, Pet. App. 58-59:

> It is important to remember that the defendants are not charged with violating [Section 641]. They are charged with conspiring to violate that section. And that is an important distinction. The crime of conspiracy to convey without authority is an independent offense, separate and distinct from the actual violation of conveyance without authority.

In light of that instruction, the jury could not have been confused by the instruction on the substantive offense of unlawful conveyance. Indeed, the instruction on the substantive offense was entirely proper, because, in order to determine whether petitioners conspired to violate Section 641, the jury needed to know what conduct would constitute the substantive violation. Petitioners cite no case holding that it is

reversible error to inform the jury of the nature of the substantive offense that the defendant is charged with conspiring to commit.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

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[7] *United States* v. *McCoy*, 539 F.2d 1050 (5th Cir. 1976), cert. denied, 431 U.S. 919 (1977), the only case cited by petitioners (91-374 Pet. 26; 91-626 Pet. 24), stands for the proposition that *failure* to instruct the jury on the nature of the underlying substantive offense is not reversible error.

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